TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES EX RELATIONE GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 14, 1936.

CERTIORARI GRANTED MARCH 15, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 285

UNITED STATES EX RELATIONE GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

	Page
Proceedings in U. S. C. A., District of Columbia	1
Caption	1
Record from Supreme Court of District of Columbia	1
Caption	1
Petition for writ of mandamus	2
Exhibit "A"—Will of John A. Brown, Jr.	7
Rule to show cause and marshal's return	16
Answer	17
Demurrer to answer	26
Judgment	29
Memorandum as to bond	30
Assignments of error	30
Designation of record	30
Clerk's certificate	31
Minute entries of argument and submission	32
Opinion, Groner, J.	33
Judgment	40
Designation of record	41
Clerk's certificate	42
Order allowing certiorari	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 17, 1937.

—8845-C

United States Court of Appeals for the District of Columbia

No. 6618.

U. S. ex rel. Girard Trust Co., etc., appellant,

vs.

Guy T. Helvering, Commissioner of Internal Revenue.

a Supreme Court of the District of Columbia.

At Law.

No. 85102.

United States ex Relatione Girard Trust Company, Trustee under the will of John A. Brown, Jr., Deceased, Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent.

United States of America,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 85102.

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Board and Chestnut Streets, Philadelphia, Pennsylvania, Petitioners,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.

Petition for Writ of Mandamus.

Filed February 20, 1935.

The petition of Girard Trust Company, trustee under the will of John A. Brown, Jr., deceased, respectfully represents to the Court as follows:

1. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, transacting business in the city of Philadelphia, Pennsylvania, is a trustee under the will of John A. Brown, Jr., deceased, and brings this suit in its capacity as such trustee. Said John A. Brown, Jr., (hereinafter called the decedent) died July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania, leaving a last will and codicil thereto which were duly probated before the Register of Wills of said county, by the terms of which he gave, devised and bequeathed to petitioner, in trust, all of his residuary estate.

2. The respondent, Guy T. Helvering, is Commissioner of Internal Revenue of the United States, and is charged
2 by Section 3220 of the Revised Statutes with the power and duty to remit, refund and pay back all taxes wrongfully, erroneously or illegally assessed or collected, with interest on amounts so refunded at the rate of six per cent per annum. The respondent is sued in his official capacity as such Commissioner of Internal Revenue.

3. Attached hereto, marked Exhibit A and made a part hereof, is a true and correct copy of the will of said de-

cedent, executed April 14, 1913, and of the codicil thereto, executed February 10, 1919, both of which documents were admitted to probate by said Register of Wills on July 23, 1919, and letters testamentary were duly issued on the same date to petitioner as executor of said will. On December 30, 1920, petitioner, as said executor, delivered to itself as trustee under said will, the residuary estate so devised to it as such trustee, and at all times since that date petitioner has been the duly qualified and acting trustee of said estate.

4. Decedent's widow, Harriett Etting Brown, (hereinafter called the widow) by writing duly signed, acknowledged, delivered to decedent's executors and duly filed and recorded, as required by the statutes of Pennsylvania, elected to take under the said will and codicil in lieu of taking the interest allowed her in decedent's estate by the law of Pennsylvania.

5. During the years 1924 to 1930, inclusive, petitioner as such trustee currently distributed to the widow the entire net income of the trust. Petitioner duly filed with the Collector of Internal Revenue returns of income for said trust estate for each of said years, and, in computing the net taxable income of said trust estate, it deducted from gross income the amounts so distributable and distributed to the widow, pursuant to the provisions of section 219(b)(2) of the Revenue Act of 1924, and corresponding provisions of subsequent Revenue Acts. Such distributions were reported as income by the widow in her federal income tax returns for each of the years 1924 to 1927, inclusive, but she did not report the same as income in her returns for 1928 and subsequent years.

6. On March 15, 1929, the then Commissioner of Internal Revenue, pursuant to the provisions of Section 274 of the Revenue Act of 1926, notified petitioner of his determination of deficiencies in income taxes due from petitioner as such trustee, for the years 1924 and 1925, in the respective amounts of $37,252.40, and $40,361.72. In his determination of said deficiencies the Commissioner of Internal Revenue, as the sole ground therefor, disallowed as deductions, in computing the taxable net income of said trustee, the amounts of the income of the trust estate so distributed by petitioner to the widow for the years 1924 and 1925.

7. Thereafter, on May 11, 1929, petitioner duly filed with the United States Board of Tax Appeals its petition in

Docket No. 44,369 for a redetermination of the deficiencies so claimed for the years 1924 and 1925 by said Commissioner of Internal Revenue. On June 23, 1931, the Board of Tax Appeals entered its decision, wherein it held that there were deficiencies due from petitioner as such trustee, in the respective amounts of $30,278.28 for the year 1924, and $16,580.85 for the year 1925. On December 21, 1931, petitioner duly filed with the United States Circuit Court of Appeals for the Third Circuit a petition for review of said decision of the Board of Tax Appeals, and on April
4 26, 1933, said Circuit Court of Appeals entered its order disallowing the deficiencies determined by the said Board of Tax Appeals, and holding that petitioner was entitled to deduct amounts so distributed to said widow, in computing the net income of the trust estate subject to tax.

8. The assessment or collection of the deficiencies for 1924 and 1925 so determined by the Board of Tax Appeals was not stayed by the filing of a bond, pending review by said Court, and the then Commissioner of Internal Revenue assessed the same against petitioner and on February 9, 1932, petitioner paid the amounts thereof, together with interest thereon of $12,453.91 for 1924 and $5,825.10 for 1925.

9. Pursuant to the mandate of the Circuit Court of Appeals, the Board of Tax Appeals on July 7, 1934, entered its decision, wherein it ordered and decided that there were no deficiencies due from petitioner for the years 1924 and 1925, and that petitioner, as such trustee, had overpaid its taxes for said years in the respective amounts of $30,278.28 and $16,580.85.

10. On January 22, 1931 the then Commissioner of Internal Revenue, pursuant to the provisions of Section 272 of the Revenue Act of 1928, notified petitioner of his determination that there was a deficiency in income taxes due from petitioner as such trustee in the amount of $10,262.28, for the year 1928. Thereafter, on March 6, 1931, petitioner duly filed with the United States Board of Tax Appeals its petition in Docket No. 53426 for a redetermination of said alleged deficiency, and on September 29, 1934, the said Board entered its decision therein, finding (a) that there was no deficiency for said year, (b) that petitioner
5 had made an overpayment of tax in respect of the

year 1928 in the amount of $4,376.39, (c) that no claim for refund of the same had been filed, and (d) that the overpayment was made within two years before the filing of the petition therein. No petition for review of said decision was filed, and the decision became final on December 29, 1934.

11. There are no income, war-profits, or excess-profits taxes, or instalment thereof, due from petitioner for any year or period.

12. Since September 29, 1934, petitioner has demanded of respondent that said amounts paid pending Court review, as more fully stated in paragraphs 7 and 8 hereof, and said overpayment determined by the Board, as more fully set out in paragraph 10 hereof, be refunded to petitioner together with interest thereon as provided by law, but respondent has failed and refused to refund said amounts or any part thereof, basing his refusal so to do upon the following grounds:

That the widow included in her returns and paid the Federal income tax imposed upon the amounts of trust income distributable and distributed to her for 1924 to 1927, inclusive, but thereafter filed claims for refund of such taxes, and respondent refunded same to the widow; that such refunds were erroneously made, as a matter of law, but that respondent is now barred by the statute of limitations from recovering same from the widow; that the widow owes income taxes for the years 1928 to 1930, inclusive, the assessment and collection of which are barred by the statute of limitations; that the aggregate amount of such barred claims against the widow exceeds the amounts due as refunds to petitioner; and that respondent is entitled to apply such refunds due petitioner to the extinguishment of such barred claims against the widow.

6 13. Petitioner alleges that respondent is without authority to offset against refunds due petitioner any alleged claims against the widow; that in refusing to make such refunds to petitioner, respondent is acting in violation of the express provisions of Section 1001(d) of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, and of Section 322(d) of the Revenue Act of 1932; that prior to its coming into this Court, petitioner has exhausted all the adequate remedies open to it to obtain the refund of said amounts justly due it; that

petitioner's requests for refund of the same have been unlawfully and illegally denied; and that there is no other course open to petitioner but to petition this Court.

Wherefore, the premises being considered, petitioner prays:

1. That a rule may issue directing the respondent to appear before this Court and show cause, if any there be, why a writ of mandamus should not be issued commanding and directing respondent to refund to petitioner, without set-off of any kind or in any amount, the amounts so determined by the Board of Tax Appeals to be due petitioner, together with interest thereon as provided by law.

2. That a writ of mandamus may issue to said respondent commanding and directing him to refund to petitioner $65,138.14, being amounts so paid by petitioner to respondent on February 9, 1932, with respect to the years 1924 and 1925, and to refund to petitioner $4,376.39 with respect to the year 1928, all with interest thereon, as allowed by law.

3. For such other and further relief as the nature
7 of the petition may require.

GIRARD TRUST COMPANY,
Trustee under Will of John A. Brown, Jr., Deceased,
By G. L. BISHOP, JR.,
Vice Prest.

H. C. KILPATRICK,
Attorney for Petitioner.
CHARLES MYERS,
Of Counsel.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

G. L. Bishop, Jr., being first duly sworn, deposes and says that he is Vice-President of Girard Trust Company, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that he is authorized by said petitioner to verify this petition; and that the matter and facts stated therein are true to the best of his knowledge, information and belief.

G. L. BISHOP, JR.

Subscribed and sworn to before me this the 8th day of February, 1935.

[SEAL.] G. W. HORNSBY,
Notary Public.

(My commissionexpires December 7, 1935.)

8 EXHIBIT A.

I, John A. Brown, Jr., of Newtown Township, Delaware County, State of Pennsylvania, do hereby make, publish and declare my last Will and Testament in manner following:

First. I direct all my just debts to be paid as soon after my decease as they reasonably can.

Second. I give and devise my house and lot of ground thereto belonging, being Number 224 South Nineteenth Street in the City of Philadelphia, and containing thirty-three feet in front by one hundred and forty-five feet in depth, my stable Number 2038 Rittenhouse Street, in said City, and my country house, stables and other buildings with the grounds thereto belonging, being about one hundred and fifty acres, more or less, situate in Newtown Township, Delaware County, Pennsylvania, to my wife Harriet Etting Brown; to have and hold both the said premises situate in the City of Philadelphia and in Newtown Township as aforesaid, for and during her natural life. At her death the said premises in the City of Philadelphia and in Newtown Township shall, if owned by my estate, fall into, form, be and become part of my residuary estate. I direct that all taxes, charges, rates, assessments, insurance premiums and cost of repairs to said houses and premises, or any or either thereof, shall be paid by my Trustees out of the balance of the income of my residuary estate after the payment of the annuity to my wife as hereinafter provided.

Third. I give and bequeath unto my wife absolutely all my furniture, plate, plated ware, pictures and household goods, and furniture of every description, and my horses, carriages, harness, motor cars, and my clothing, jewelry and similar personal effects, farming utensils and appliances and cattle in or about and pertaining to my said houses and premises in the City of Philadelphia and in

Newtown Township. I direct that no inventory or
9 appraisement shall be made of any of said articles and that all taxes, if any thereon, shall be paid by my Trustee from my residuary estate.

Fourth. All the rest, residue and remainder of my estate, real and personal, except the real estate situate in the State of New York for which provision is hereinafter specifically made, I give, devise and bequeath to Girard Trust Company and its successors In Trust, nevertheless, for the following uses and purposes:

To retain existing investments or to sell the same and make reinvestments as hereinafter provided; to invest and reinvest in mortgages which are a first lien on real estate in Pennsylvania and New York, in the first mortgage bonds of dividend paying railroads, in car trust or equipment trust certificates of dividend paying railroads, in United States loans, in the loans of the State of Pennsylvania and the State of New York, in loans of municipalities, township, school districts and similar public divisions in the State of Pennsylvania, and in ground rents in the City of Philadelphia; to collect, receive and take the rents, issues, income and interest arising from the same and after the payment of all proper commissions and charges, to pay to my said wife Harriet Etting Brown, if she shall survive me and during her lifetime, in lieu, with the life estate in my said houses as hereinbefore provided, of all dower in my estate, the sum of Ten thousand Dollars ($10,000) per month, the first payment to be made on the first day of the month succeeding my death, free and clear of all taxes, which shall be paid by my said Trustee out of the remaining income, and to pay the balance of said income to and among my children by my said wife Harriet Etting Brown, or to and among the child or children of any deceased child, such child or children taking only their parents' share, in equal shares during the lifetime of my said wife. Upon the death of my said wife, to pay the entire income from my said estate in equal shares to and among my child
10 or children by her living at the death of my said wife, or to and among the child or children of any deceased child, such child or children taking their parents' share, until the youngest child of a deceased child living at the date of my death shall reach the age of twenty-one years, and thereupon to pay over the principal of my said

estate in equal parts or shares to and among my child or children by my said wife, then living, and to and among the child or children of any deceased child of mine, as aforesaid, such child or children to take their parents' share.

If there shall be no children of mine by my said wife living at the date of my death or born thereafter, then In Trust, to pay the balance of the income during the lifetime of my said wife to Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, children of my sister Isabel Brown Coxe, and to Alexander Brown and Rosalie Brown Dolan, children of my brother Neilson Brown, in the same proportions and under the same trusts and uses as provided hereinafter for the payment to them of the income from my estate after the death of my wife, she leaving surviving her no child or children of mine by her, or child or children of a deceased child as aforesaid.

And in trust, upon and after the death of my said wife Harriet Etting Brown, without leaving surviving her a child or children of mine by her, or a child or children or a deceased child of mine by her, to pay the net income from my estate, real and personal, in the following manner: One-half thereof in equal shares to and among Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, the children of my sister, Isabel Brown Coxe, now deceased, for and during their respective natural lives, and upon the death of each or any one of the said Henry B. Coxe, Alexander Brown Coxe or Charles E. Coxe before or after my death, to pay one-third of one-half of the net income of my residuary estate to the child or children, in equal
11 shares, of the one of my said nephews so dying, who were living at the date of my death, for their natural lives, and upon the death of each of said child or children, to pay the share of the said income of the child so dying to his or her child or children until such child or the eldest of such children shall reach the age of twenty-one years, and thereupon to pay over to each of such children a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children as herein provided; and as to any child or children of any one of my said nephews so dying, born after my death, to pay to such child or children his or her or

their equal shares in the said one-half of one-third of the income of my residuary estate, with the child or children living at my death as aforesaid, until such child or the eldest of such children born after my death as aforesaid, shall reach the age of twenty-one years, and thereupon to pay to such child and to such children born after my death as aforesaid, a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children as herein provided. If any of my said nephews shall die without leaving a child or children surviving him, or the child or children of any deceased child surviving him, In Trust, to pay the income of the one so dying in equal shares to the survivors or to the survivor of such nephew, or to the child or children of a deceased nephew, such child or children taking the parent's share, upon the same uses and trusts as such nephew, or such child or children of a deceased nephew, take- under the provisions of this Will; or if any one of my said nephews shall die leaving a child or children surviving him and there shall be a failure of issue of such child or children, or, such child or children having issue, such issue shall die before becoming
entitled to the principal share of my estate to which
12 it and they shall be entitled under the provision of
this Will, then In Trust, to pay the income and distribute the principal of the share of such child or children or such issue, to the same person or persons and upon the same uses and trusts as herein provided for the child or children, or their issue, of my other said nephews.

And in trust, to pay one-half of the net income of my residuary estate in equal shares to my nephew, Alexander Brown and my niece, Rosalie Brown Dolan, children of my brother, Neilson Brown, now deceased, for and during their respective natural lives, and upon the death of said Alexander Brown and or of the said Rosalie Brown Dolan, to pay one-half of one-half of the net income of my residuary estate to the child or children of either the said Alexander Brown or Rosalie Brown Dolan so dying, who were living at the date of my death, for their natural lives, and upon the death of each of said child or children to pay the share of the said income of the child so dying to his or her child or children until such child or the eldest of such children shall reach the age of twenty-one years, and thereupon to

pay over to each of such children a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children, as above provided; and as to any child or children of either of my said nephew, Alexander Brown, or my said niece, Rosalie Brown Dolan, so dying, born after my death, to pay to such child or children his, her or their equal shares in the said one-half of one-half of the net income of my residuary estate, with the child or children living at my death as aforesaid, until such child or the eldest of such children born after my death as aforesaid shall reach the age of twenty-one years, and thereupon to pay to such child and to such children born after my death as aforesaid, a principal part of my residuary estate representing their respective interests therein, as determined by the shares of the income theretofore payable to such child or children as herein provided. If my said nephew, Alexander Brown and or my said niece, Rosalie Brown Dolan, shall die without leaving any child or children surviving him or her, or the child or children of any deceased child surviving him or her, In Trust, to pay the income of the one so dying to the survivor of said Alexander Brown or said Rosalie Brown Dolan, or to the child or children of said Alexander Brown or Rosalie Brown Dolan deceased, such child or children taking their parents' share, upon the same uses and trusts as said Alexander Brown, or said Rosalie Brown Dolan, or the child or children of either thereof, take under the provisions of this Will; or if either my said nephew Alexander Brown, or my said niece Rosalie Brown Dolan, shall die leaving a child or children surviving him or her and there shall be a failure of issue of such child or children, or, such child or children having issue, said issue shall die before becoming entitled to the principal share of my estate to which it and they shall be entitled under this Will, then In Trust, to pay the income and distribute the principal of the share of such issue to the same person or persons and upon the same uses and trusts as herein provided for the child or children, or their issue, of the said Alexander Brown or Rosalie Brown Dolan respectively.

And in trust further, if no one of my said nephews, Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe shall leave surviving him a child or children, or a

child or children of a deceased child as aforesaid, or leaving such child or children there shall be a failure of issue thereof, then upon the death of the last survivor of my said nephews Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, to pay the income and distribute the principal of the said one-half of my residuary estate to the same person or persons and upon the same uses and trusts as herein provided for the other one-half of the income and principal of my residuary estate, and likewise

14 In Trust, if neither my said nephew Alexander Brown or my said niece Rosalie Brown Dolan shall leave surviving him or her a child or children, or the child or children of a deceased child as aforesaid, or leaving such child or children there shall be a failure of issue thereof, to pay the income of and distribute the principal of one-half of my residuary estate to the same person or persons and upon the same uses and trusts herein provided for the each one-half of my residuary estate.

Fifth. I direct that all rents that have accrued prior to my decease, but have not been collected, and all interest or return on any investment that has accrued up to the time of my decease, shall be taken and treated as income and not as principal, and disposed of as I have directed in regard to income.

Sixth. I direct my Trustee hereinafter named to sell all real estate which shall be acquired by foreclosure of mortgages held by me at the time of my death or by my estate thereafter, as soon after the acquisition thereof as may be convenient and, in the judgment of my Executors or my said Trustee, shall not be detrimental to the interests of my estate, and to hold the proceeds of such sales as a part of my residuary estate.

Seventh. I give, devise and bequeath unto Girard Trust Company and its successors, all my real estate situate in the State of New York of which I shall die seized, In Trust, to receive the rents and profits thereof and during the lifetime of my said wife, unless the said real estate shall be sooner sold, to apply them to the payment of the annuity to my said wife and the distribution of income to my children or my nephews and nieces, as herein above provided, and upon my death or at any time during the life of my said wife and upon her death after my death, to sell the said real estate and to receive and hold the proceeds thereof

as part of my residuary estate, upon the uses and trusts and for the purposes hereinbefore specifically provided in regard thereto.

15 Eighth. If my said wife, Harriet Etting Brown shall not desire to live in my said house in the City of Philadelphia or in my said house in Newtown Township, or to use the said stable in Philadelphia, then with her assent in writing, they or any of said premises may be leased by my said Trustee or sold by it as it shall, with the consent of my said wife, determine. If they shall be leased, the rentals thereof shall be paid by my said Trustee to my said wife, Harriet Etting Brown, during her life-time. If they shall be sold, the proceeds shall be invested by my said Trustee as part of my residuary estate and the income therefrom paid to my said wife, or such part of the proceeds as my said wife may desire to be so applied, shall be expended in the purchase or construction of another house or houses and premises for her use during her life, and such houses or premises shall be held in trust for the use and benefit of my said wife during her life, and thereafter upon the same uses and trusts as hereinabove provided as to my residuary estate, and the balance of said proceeds shall be invested and the income thereof paid as above provided. If the said premises, or either of them, shall be injured or destroyed by fire or otherwise, they may be repaired and restored by my Trustee by the application of moneys out of my residuary estate to the extent that the insurance thereon shall be insufficient.

For the purpose of carrying out the foregoing provisions of my Will, I give to my Executors hereafter appointed and to my said Trustee and its successors, power to sell all or any part of my real estate (subject to the consent of my said wife as to my said premises in Philadelphia and in Newtown Township and any others which may be purchased for her use as aforesaid) either at public or private sale, for such prices as they may see fit, and to grant and convey the same to the purchaser thereof in fee simple, or any less estate, free and discharged of all trusts of this my Will, without liability on the part of such purchaser or pur-

16 chasers to see to the application of the purchase money.

Ninth. My Executors shall not be bound to file any inventory or appraisement of my estate, but may do so if in

their judgment such inventory and appraisement should be filed. I give to my Executors hereinafter named and to my said Trustee, and its successors severally, authority and power from time to time, in the exercise of a sound discretion, to take and pay for out of my residuary estate any allotments of bonds, stocks or securities made by corporations in which my estate shall hold bonds, stocks or other securities, to become parties to any plan of reorganization of such corporations by assenting thereto, and accepting securities to be issued thereunder, and generally to do all things necessary in the exercise of their judgment for the protection of my estate and the investments thereof, in full exercise of the powers as holders of said bonds, stocks or other securities.

Tenth. I nominate and appoint Girard Trust Company and Henry B. Coxe, to be the Executors of this my Will and Testament, hereby revoking any other Wills or Codicils by me at any time heretofore made, and I declare this only to be and containing my last Will and Testament. Should my said nephew, Henry B. Coxe not survive me, or decline or be unable to serve as Executor, then I direct that Girard Trust Company shall be the sole Executor of this my Will.

In witness whereof I, the said John A. Brown, Jr., have to this my last Will and Testament, contained on this and the nine preceding pages, set my hand and seal, to wit: my hand to the bottom of each of the nine preceding pages, and my hand and seal to this last page, this 14th day of April, in the year of our Lord One Thousand Nine Hundred and Thirteen.

17 JOHN A. BROWN, JR. [SEAL.]

Signed, sealed, published and declared by John A. Brown, Jr., the Testator above named, as and for his last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as attesting witness.

JOHN HAMPTON BARNES.
SPENCER ERVIN.
JOHN CARBURY.

18 I, John A. Brown, Jr., of Newtown Township, Delaware County, State of Pennsylvania, do hereby make and publish this as and for a Codicil to my last Will

and Testament dated the Fourteenth day of April, A. D. 1913:

I desire to increase the amount of net income to be paid to my wife, Harriet Etting Brown, from my estate, as directed to be paid under my said Will, and to that end and in lieu of the payment of Ten Thousand Dollars ($10,000) per month to be paid to her as herein provided, I authorize and direct the Girard Trust Company, Trustee of my residuary estate and Trustee with respect to all my real estate situated in the State of New York, during the lifetime of my said wife to apply the income of all my estate, real and personal, including therein the income from my New York real estate, as follows:

To the payment of all taxes, charges, assessments, rates, insurance upon and cost of repairs of my real estate, and upon any substituted therefor, as provided in my Will; to the payment of all taxes upon the principal of or income from my estate payable or deductible by my Trustee or otherwise chargeable against the said principal or income thereof; to the payment of the commissions of the Trustee and costs and expenses of the management of my trust estate; to the reimbursement of any taxes which my said wife shall be required to pay or shall pay upon the income paid to and received by her from my estate;

And after making all said payments or provision therefor, to pay the net income from all of my estate, real and personal arising after the date of my death, up to but not exceeding the sum of Two hundred thousand Dollars ($200,000) per annum, to my said wife, Harriet Etting Brown, for and during the term of her natural life, in quarterly payments or in payments made at shorter intervals and in appropriate and convenient divisional amounts.

I further dire-t my Trustee, during the lifetime of my said wife, to pay the balance and remainder of the
19 annual net income from my estate, if any, after all of the said payments have been made and provided for, and after the said amount of Two hundred thousand Dollars ($200,000) has been paid to my said wife, to and among the persons and in the manner directed in my said Will, and after the death of my said wife to pay the entire net income from my estate as provided and directed in my said Will in that event, and to hold the principal of my

estate upon the uses and subject to the provisions of my said Will.

Except as herein specificially altered and modified I hereby ratify, confirm and republish my said Will.

In witness whereof, I have hereunto set my hand and seal this 10th day of February, A. D. One thousand nine hundred and nineteen (1919).

JOHN A. BROWN, JR. [SEAL.]

Signed, sealed, published and declared by John A. Brown, Jr., the Testator above named, as and for a Codicil to his last Will and Testament, in the presence of us, who, in his presence and by his express direction, have hereunto subscribed our names as attesting witnesses in the presence of each other.

JOHN HAMPTON BARNES.
HELEN GILLINGHAM.
FRANCIS B. BIDDLE.

20 *Rule to Show Cause.*

Issued February 20, 1935.

* * * * * * *

Upon consideration of the petition of Girard Trust Company, Trustee under the will of John A. Brown, Jr., deceased, filed in the above entitled cause on the 20th day of February, 1935, it is by the Court this 20th day of February, 1935,

Ordered, that the respondent, Guy T. Helvering, Commissioner of Internal Revenue of the United States, appear in this Court at ten o'clock a. m., on the 6th day of March, 1935, and show cause, if any he have, why the prayer of said petitioner should not be granted and a writ of mandamus issued against him as therein prayed; provided, however, a copy of this order be served upon said respondent on or before the 21st day of February, 1935.

By the Court. O. R. LUHRING,
Justice.

Marshal's Return.

Served a copy of the above rule on the above named Guy T. Helvering, Commissioner by serving his assistant Wright Matthews 2/20/35 personally.

JOHN B. COLPOYS,
U. S. Marshal in and for the Dist. of Columbia,
By ELMER GRAVES,
Deputy U. S. Marshal.
K.

21 *Answer of Respondent.*

Filed April 22, 1935.

* * * * * * *

Now comes Guy T. Helvering, Commissioner of Internal Revenue, and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the petition filed herein, and to the jurisdiction of the court in the premises, and relying on the same as if motion to dismiss had been interposed, nevertheless files this, his answer to so much of such parts of the said petition and the rule to show cause issued herein as he is advised it is material or necessary for him to make answer unto, and says:

(1) Respondent admits the allegations of the first paragraph of the petition.

(2) Respondent for answer to the second paragraph of the petition admits that he is Commissioner of Internal Revenue of the United States, that his authority is prescribed by law, and that he is sued in his official capacity as such Commissioner of Internal Revenue. Respondent avers, however, that as to the allegations of power and duty attributed to him in the second paragraph of the petition, the same are conclusions of law which he is not required to make answer unto.

22 (3) Respondent admits the allegations of the third paragraph of the petition.

(4) Respondent admits the allegations of the fourth paragraph of the petition.

(5) Respondent admits the allegations of the fifth paragraph of the petition.

(6) Respondent admits the allegations of the sixth paragraph of the petition.

(7) Respondent for answer to the allegations of the seventh paragraph admits all the allegations therein except that respondent avers that the petitioner has stated conclusions in its allegations as to the order of the Circuit Court of Appeals for the Third Circuit, requiring neither admission nor denial thereof by respondent, and respondent affirmatively avers that the said Circuit Court of Appeals, under date of April 26, 1933, entered its order reading in words as follows:

It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this case be, and the same is hereby reversed.

(8) Respondent for answer to the allegations in the eighth paragraph of the petition admits the same except that respondent affirmatively alleges that the taxes assessed against the petitioner, as alleged, together with interest thereon, were paid February 10, 1932, to the Collector of Internal Revenue for the First District, Philadelphia, Pennsylvania, and denies that the same were paid February 9, 1932, as alleged.

(9) Respondent for answer to the allegations of the ninth paragraph of the petition avers that the petitioner has stated conclusions requiring neither admission nor denial by the respondent, and respondent affirmatively avers that the Board of Tax Appeals, under date of July 7, 1934, entered its decision reading in the words and figures following:

23 Whereas, the above entitled proceeding was remanded by the Circuit Court of Appeals for the Third Circuit for further proceedings, and

Whereas, counsel for both parties have filed proposed recomputations in accordance with the opinion and mandate of said court, which recomputations are in agreement, now therefore, in accordance with said recomputations, it is

Ordered and decided that there are no deficiencies for the years 1924 and 1925 and that there are overpayments for said years in the respective amounts of $30,278.28 and $16,560.85.

(10) Respondent for answer to the allegations in the tenth paragraph of the petition admits the same except the

respondent avers that the petitioner has stated conclusions in its allegations as to the decision entered by the Board of Tax Appeals, under date of September 29, 1934, requiring neither admission nor denial by respondent, and respondent affirmatively avers that the Board of Tax Appeals under date of September 29, 1934, entered its decision reading in the words and figures following:

Under written stipulation signed by counsel for the parties in the above entitled proceeding and filed with the Board on September 20, 1934, it is

Ordered and decided: That the petition herein respecting income tax liability for the year 1928 was filed with the Board on March 6, 1931; that no claim for refund has been filed; that within two years of the filing of the petition, tax was paid in the total amount of $9,195.75; that the true tax liability of the petitioner is $4,819.36, and therefore, according to the provisions of Section 504 (a), Title III, of the Revenue Act of 1934, there is an overpayment of $4,376.59 for the year 1928.

Respondent further admits that no petition for review of said decision was filed, and that the decision became final on December 29, 1934.

24 (11) Respondent for answer to the allegations in the eleventh paragraph of the petition denies the same for reasons more specifically hereinafter set forth in paragraph (e)

(12) Respondent for answer to the allegations in the twelfth paragraph of the petition denies that any amounts were paid by petitioner pending court review, but avers that the same constituted taxes duly assessed and collected, as alleged by paragraph 8 of the petition and admitted herein, and respondent admits that petitioner has demanded the refund of the said amounts assessed and paid, as aforesaid, with this limitation on his admission and to this extent: that petitioner, under date of January 26, 1934, filed with the Collector of Internal Revenue for the First Internal Revenue District at Philadelphia, Pennsylvania, its claim for refund in the amount of $42,732.19, representing tax and interest assessed against and paid by petitioner for the calendar year 1924, as alleged in paragraphs 7 and 8 of the petition and admitted herein, and its claim for refund in the amount of $22,405.95, representing tax and interest

assessed against and paid by petitioner for the calendar year 1925, as alleged in paragraphs 7 and 8 of the petition and admitted herein, and respondent admits that the said amounts, or any part thereof, have not been refunded to petitioner but respondent denies that he has refused to refund said amounts or any part thereof. Respondent for further answer to the allegations in the twelfth paragraph of the petition, with reference to the overpayment found by the Board for the year 1928 as alleged in paragraph 10 of the petition, and admitted herein, denies that any formal demand for refund of the same, or any part thereof, has been made of respondent by petitioner at any time; respondent avers that petitioner, by counsel, has orally and by informal correspondence requested the refund of the said overpayment, admits that the same, or any part thereof, has not been refunded to the petitioner but respondent denies that he has refused to refund said overpayment or any part thereof.

Respondent for answer to the second paragraph of the twelfth paragraph of the petition, the same being the alleged grounds of the respondent for his alleged refusal, avers that the same represent conclusions of the petitioner and require neither admission nor denial by respondent but if the same be deemed material respondent denies them and demands strict proof thereof, and further respondent avers that the same are immaterial, incompetent and irrelevant and respondent respectfully moves the Court that the same be stricken from the petition.

(13) Respondent for answer to the allegations in the thirteenth paragraph of the petition avers that the same represent conclusions of the petitioner and require neither admission nor denial by respondent, but if the same may be deemed material respondent denies them, and specifically denies that, prior to its coming into this Court, or at this time, petitioner had, or has, exhausted all the adequate remedies open to it to obtain the refunds alleged to be justly due it, and specifically denies that petitioner's requests for refund of any amounts alleged to be due it have been unlawfully and illegally denied or otherwise denied; and denies that there is no other course open to petitioner but to petition this Court, and respondent avers that petitioner has not formally requested any refunds other than by the claims for refund, filed as aforesaid, and set out in paragraph 12

herein, and other than, by counsel, by oral and informal written request.

Respondent for Further Answer to the petition filed herein avers:

(a) That this Court is without jurisdiction in this action for the reasons:

(1) That the determination by the respondent to allow or to reject a claim for refund involves the exercise of his discretition.

(2) That the determination by the respondent to credit or refund or to disallow the overpayments found by the Board of Tax Appeals in accordance with the Board's decision entered as averred in paragraph 9 herein involves the exercise of his discretion.

(3) That the determination by the respondent to credit or refund the overpayment found by the Board of Tax Appeals in accordance with the Board's decision as averred in paragraph 10 herein involves the exercise of his discretion.

26 (4) That petitioner has an adequate and complete remedy at law, if any it be entitled to, in accordance with the statutes in such cases made and provided for, and that prior to, and at the time of bringing this action, plaintiff had, and at this time now has, such an adequate and complete remedy.

(5) That the petition herein is premature and untimely, and respondent respectfully moves the court to dismiss the same, for the reasons that respondent has not taken any final action with regard to the said claims for refund, filed for the years 1924 and 1925 as aforesaid, neither rejecting nor allowing the same, and that the same are still under consideration by him; and that more than six months have elapsed since the filing of the same and had elapsed at the time this action was filed; that he has not taken any final action with regard to the overpayments for the years 1924 and 1925 found by the Board of Tax Appeals in its decision entered July 7, 1934, as averred by paragraph 9, herein, neither crediting nor refunding the same nor refusing to credit or refund the same, and that the same at the time of the filing of the petition herein were, and still are, under consideration by him; that he has not taken any final action with regard to the overpayment for the year 1923 found

by the Board of Tax Appeals in its decision entered September 9, 1934, as averred in paragraph 10 herein, neither crediting nor refunding the same nor refusing to credit or refund the same, and that the same at the time of the filing of the petition herein was and still is under consideration by him; and with respect to all these matters, aforesaid, respondent avers that he has not acted finally in any regard.

(b) Further answering the petition the respondent avers that he has been, was at the time of the filing of the petition, and is now, considering the claims for refund, filed as aforesaid by petitioner, that he has not allowed the same nor any part thereof, and that the same, nor any part thereof, have not been rejected nor has notice of their rejection, or any part thereof, being given to petitioner, and that more than six months had expired since the filing of the same at the time of the filing of this petition.

27 (c) Further answering the petition the respondent avers that, at the time of the filing of this action he had notice of the decision of the Board of Tax Appeals entered July 7, 1934, as averred by paragraph 9 herein, that the same had been, was at the time of the filing of the petition herein, and is now, under consideration by him; that he has not credited or refunded the overpayments, or any part thereof, found by the said decision and that he has not refused to credit or refund the said overpayments, or any part thereof, and that no formal request or demand has been made of him by petitioner to refund or credit the same and that he has not failed or refused to act in any particular in the manner and form prescribed by law. Respondent avers that any requests or demands made of him were, by counsel, by oral and/or informal written correspondence.

(d) Further answering the petition the respondent avers that at the time of the filing of this action he had notice of the decision of the Board of Tax Appeals as averred by paragraph 10 herein, that the same had been, was at the time of the filing of the petition herein, and is now, under consideration by him; that he has not credited or refunded the overpayment, or any part thereof, found by the said decision and that he has not refused to credit or refund the said overpayment, or any part thereof, and that no formal request or demand has been made of him by peti-

tioner to credit or refund the same and that he has not failed or refused to act in any particular in the manner and form prescribed by law. Respondent avers that any requests or demands made of him were, by counsel, by oral and/or informal written correspondence.

(e) Further answering the petition the respondent avers:

(1) That the petitioner is trustee under the will of John A. Brown, Jr., deceased, as alleged in paragraphs 1 and 3 of the petition and admitted herein.

(2) That Harriet Etting Brown, widow of the decedent John A. Brown, Jr., is the sole beneficiary of the said trust created by the said will.

28 (3) That, pursuant to the provisions of the said will, the said Harriet Etting Brown elected to receive and did receive income from the said trust during the following calendar years in the following amounts and paid taxes thereon in the following amounts:

Year	Income	Taxes
1924	$129,197.72	$24,895.72
1925	110,782.37	11,923.09
1926	115,682.41	12,981.33
1927	107,147.48	10,990.66

That the said taxes were paid to the Collector of Internal Revenue for the First Internal Revenue District Philadelphia, Pennsylvania, and were by him duly covered into the Treasury of the United States.

(4) That the said Harriet Etting Brown, on the dates set out below, filed claims for refund of the taxes paid, as aforesaid, for the said years in the following amounts:

Date.	Year.	Amount.
March 14, 1929	1924	$23,578.65
March 14, 1929	1925	11,883.32
August 5, 1929	1926	12,957.95
January 22, 1931	1927	10,966.80

That the reason advanced by the said Harriet Etting Brown as a basis for her said claims was, that, the income received by her from the said trust, as aforesaid, was not taxable to her for the reason that it represented the return of her dower and/or statutory rights relinquished by her when she elected to take under the said will.

(5) That the then Commissioner of Internal Revenue, and/or his agents, considered the said claims and determined to allow the same, for the reason advanced therein, as aforesaid, and pursuant to that determination caused his certificates of overassessment to be issued, and overassessments scheduled pursuant thereto, and in ac-
29 cordance therewith, refunds of taxes, with interest thereon, in the following amounts, for the following years were made to the said Harriet Etting Brown:

Year	Tax Refund	Interest	Total
1924	$24,807.99	$8,762.62	$33,570.61
1925	11,903.18	3,626.66	15,529.84
1926	12,958.15	3,173.77	16,131.92
1927	10,966.80	2,025.68	12,992.48

And the said amounts were paid September 17, 1931, out of moneys in the Treasury of the United States.

(6) That the said Harriet Etting Brown, during the calendar year 1928 received income from the said trust in the amount of $101,948.34 that she filed her individual income tax return for the said year but failed to include in the said return as subject to tax the said income, or any part thereof, and failed to pay any tax thereon and that the tax due and payable thereon by the said Harriet Etting Brown was not less than $4,376.39.

(7) That the then Commissioner of Internal Revenue, and/or his agents, examined the said return filed as aforesaid for the calendar year 1928 and determined to accept the same notwithstanding that the same did not have included therein as subject to tax the said income received as aforesaid, and notwithstanding that no tax was paid on the said income by the said Harriet Etting Brown.

(8) That the said determination of the then Commissioner of Internal Revenue, and/or his agents, to allow the said claims for refund, as aforesaid, and to accept the said return as filed, as aforesaid, was erroneous and mistaken and by reason thereof the said refunds were erroneously, mistakenly and illegally made, and the said money paid out to the said Harriet Etting Brown was erroneously, mistakenly and illegally paid out of the Treasury of the United States, and although receiving the said money, erroneously, mistakenly, and illegally paid out, as aforesaid, in
30 good faith and without intent to defraud the United

States, the said Harriet Etting Brown still retains the same without just right thereto and wholly fails, neglects and refuses to repay the same or any part thereof; and the said income for the calendar year 1928 received by the said Harriet Etting Brown, as aforesaid, has not been taxed in the amount of tax properly due and payable thereon to wit: $4,376.39, and although the said Harriet Etting Brown failed, neglected and refused to pay the said taxes properly due and owing for the calendar year 1928, as aforesaid, in good faith and without intent to defraud the United States, the same are still due and owing the said Harriet Etting Brown still wholly fails, neglects and refuses to pay the same or any part thereof.

(9) That the petitioner herein and the said Harriet Etting Brown are the same parties in interest, that the petition herein is for the benefit of the said Harriet Etting Brown, that any relief prayed herein and granted will inure to the sole benefit of the said Harriet Etting Brown to her unjust enrichment to the extent that the said Harriet Etting Brown is now justly indebted to the United States, and the said income received by her, as aforesaid, will be untaxed, and the respondent alleges that in equity and good conscience the respondent should not be commanded and directed to refund to petitioner the said amounts herein prayed for, or any amounts in excess of the amounts now justly due and owing from the said Harriet Etting.

(f) That the bill or complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for.

Wherefore, having fully answered the petition filed herein and the rule to show cause, respondent prays that the petition be dismissed and the rule to show cause discharged with costs.

GUY T. HELVERING,
Commissioner of Internal Revenue.

LESLIE C. GARNETT,
United States Attorney.
T. G. CARNEY,
Special Assistant to the Attorney General.
H. L. UNDERWOOD,
Assistant United States Attorney.

31 DISTRICT OF COLUMBIA, *ss:*

Guy T. Helvering, Commissioner of Internal Revenue, being first duly sworn deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge are true; and that those set forth upon his information and belief are believed to be true.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Subscribed and sworn to before me this 20 day of April, A. D. 1935.

[SEAL.] MARCELETTE M. TAYLOR,
Notary Public.

My Com. expires Apr. 1, 1940.

32 *Demurrer to Answer.*

Filed April 26, 1935.

* * * * * * *

Now comes the petitioner and demurs to the respondent's answer herein and says that it is bad in substance, for the following reasons:

1. The answer admits all of the material allegations of the petition, and relies for affirmative defense only upon conclusions of law and irrelevant matter.

2. The answer is vague, indefinite, conflicting, evasive and insufficient in law, in the following respects:

(a) While denying the allegations of paragraph 11, the denial is equivocal and evasive, in that it is limited by the words "for reasons more specifically set forth in paragraph (e)", and in said paragraph (e) no facts are stated which show or attempt to show, nor is it alleged, that taxes are due from petitioner for any year or period.

33 (b) While denying (in paragraph 12 thereof) that respondent has "refused" to refund the overpayments admittedly determined by the Board of Tax Appeals, the answer admits that respondent has not refunded the same, and does not state any facts in explanation of or as justification for respondent's delay and failure to refund said overpayments as required by law.

(c) While denying (in paragraphs 12 and 13) that petitioner has made any "formal demand" for the refund of the overpayment determined by said Board for 1928, the answer admits that petitioner has orally and by correspondence requested the refund of said overpayment, thereby implying, but not stating any facts tending to show, that such requests were not sufficient in law to entitle petitioner to the relief prayed for.

(d) While denying (in paragraph 12 thereof) the petitioner's statement of respondent's alleged grounds for refusal to act, and asking that the same be stricken out as immaterial, incompetent and irrelevant, the answer (in paragraph (e) thereof) sets up substantially the same grounds as a defense to petitioner's demand that the refunds be paid.

(e) While averring (in paragraph (a) (5) thereof) that the respondent "has not taken any final action" with regard to petitioner's demands or with regard to the overpayments found by the said Board, and that "the same are still under consideration by him," the answer states no facts concerning respondent's failure to act thereon, and offers no explanation of such failure, but (in paragraph (e) thereof) insists that petitioner has no right to the refunds demanded.

33½ (f) While stating generally (in paragraphs (b), (e) and (d) thereof) that respondent has not yet decided whether he will refund the overpayments determined by said Board, the answer avers (in paragraph (e) thereof) that the refunding of such overpayments would be contrary to "equity and good conscience," thus indicating clearly respondent's decision that he will not refund such amounts.

3. The defense set out in paragraph (e) of the answer is bad in substance, in that:

(a) It is based entirely upon conclusions of law as to the effect of acts done by the respondent or his predecessor with reference to the tax liability of a person not a party to this proceeding.

(b) It fails to show the existence of any liability on the part of petitioner for the amounts alleged to be due from Harriet Etting Brown, and fails to show any right in the respondent to exact payment thereof from the petitioner.

(c) It fails to show that respondent has made any attempt to collect said alleged amounts from Harriet Etting Brown, and shows affirmatively that respondent made no such attempt, but, on the contrary, with full knowledge of all the facts, refunded to her taxes paid for certain years, and failed thereafter to proceed against her for the collection of the same within the statutory period authorized for such action, and the respondent failed to assess or collect the taxes alleged to be due by her for the year 1928 within the statutory period provided for such assessment and collection.

(d) It is a patent attempt to plead, as a set-off, demands against a third party, the collection of which is
34 barred by the statute of limitations.

(e) It is an attempt to credit overpayments due one taxpayer against deficiencies alleged to be due by another, which deficiencies are barred from assessment or collection by the statute of limitations, and such a credit would be void even if the deficiencies were due by the petitioner.

(f) It is an attempt to attack collaterally decisions of the Board of Tax Appeals, from which respondent did not appeal and which have long since become final; such decisions are binding upon respondent and may not be inquired into in this proceeding.

(g) It is argumentative and states no facts fixing or tending to fix any liability on petitioner for the alleged claims against Harriet Etting Brown.

4. The conclusions of law set forth in paragraphs (a) to (d) of said answer are not well taken in that:

(a) Where the Board of Tax Appeals has determined an overpayment by a taxpayer appealing to said Board, and the Board's decision has become final, the Commissioner of Internal Revenue is charged with the ministerial duty of crediting such overpayment against deficiencies due by said taxpayer for other years, and where there are no such deficiencies due, is charged with the ministerial duty of refunding the overpayment to the taxpayer. This duty does not involve the exercise of any discretion.

(b) Petitioner has no clear, adequate or complete remedy at law for securing the refund of the amounts determined as overpayments by the Board of Tax Appeals, and

the fact that petitioner might at the same time have
35 other rights with other remedies arising out of the same transaction is not a valid reason for denying the relief prayed for herein.

H. C. KILPATRICK,
Attorney for Petitioner.

CHARLES MYERS,
Of Counsel.

36 *Order.*

Filed December 12, 1935.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause issued thereunder, the answer of the respondent, and the demurrer thereto, and, after hearing counsel for the parties and upon consideration by the Court, it is this 12th day of December, A. D., 1935,

Adjudged and ordered: That the judgment of November 25, 1935, discharging the rule and dismissing the petition be and the same hereby is vacated and for nothing held; and that the demurrer to the answer be and the same hereby is overruled.

The petitioner electing to stand on its demurrer to the answer, it is further adjudged and ordered that the petition for mandamus in this cause be and the same hereby is dismissed with costs and the rule to show cause discharged.

By the Court.

JOSEPH W. COX,
Associate Justice.

Exceptions allowed to the overruling of the demurrer, the discharge of the rule to show cause, and the dismissal of the petition, and appeal noted in open Court by the petitioner, whereupon the undertaking for costs is hereby fixed in the sum of $100 with leave to deposit the sum of $50 with the Clerk in lieu thereof.

JOSEPH W. COX,
Justice.

No Objection as to Form:
H. C. KILPATRICK,
Attorney for Petitioner.

Memorandum.

December 13, 1935.—$50 deposit by Petitioner on appeal.

37 *Assignments of Error.*

Filed December 13, 1935.

* * * * * * *

Now comes the petitioner, by its attorney, H. C. Kilpatrick, and assigns as error in the above entitled cause the following:

1. The Court erred in holding the answer filed April 22, 1935, sufficient in law as a defense to the petition.
2. The Court erred in holding as a matter of law that the writ of mandamus should not issue, upon the facts alleged in the petition and admitted in the answer.
3. The Court erred in overruling petitioner's demurrer to the answer.
4. The Court erred in dismissing the petition and discharging the rule to show cause.

H. C. KILPATRICK,
Attorney for Petitioner.

Service of a copy of the foregoing Assignments of Error is acknowledged this 13th day of December, 1935.

H. L. UNDERWOOD,
Assistant United States Attorney,
For Respondent.

38 *Designation of Record.*

Filed December 13, 1935.

* * * * * * *

In appearing the record on appeal in the above entitled cause the Clerk will please include:

1. The petition for writ of mandamus filed February 20, 1935, together with the Exhibit marked A.
2. The rule to show cause issued February 20, 1935.
3. The Answer of Respondent filed April 22, 1935.
4. The Demurrer to answer filed April 26, 1935.

5. The judgment of the Court entered December 12th, 1935, with notation of appeal.

39 6. Note of deposit of $50.00 in lieu of cost bond.

7. The Assignments of Error.

8. This designation.

H. C. KILPATRICK,
Attorney for Petitioner.

Service of a copy of the foregoing Designation of Record is acknowledged this 13th day of December, 1935.

H. L. UNDERWOOD,
Assistant United States Attorney,
For Respondent.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 39, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 85102 at Law, wherein United States ex relatione, Girard Trust Company, Trustee under the will of John A. Brown, Jr., deceased, is Petitioner and Guy A. Helvering, Commissioner of Internal Revenue, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of December, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6618. U. S. ex rel. Girard Trust Co., etc., appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. United States Court of Appeals for the District of Columbia. Filed Jan. 2, 1936. Henry W. Hodges, Clerk.

[fol. 32] Wednesday, April 8th, A. D. 1936.

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

The argument in the above entitled cause was commenced by Mr. H. C. Kilpatrick, attorney for appellant. On motion, appellant allowed to file reply brief and handed to the Court. (Mr. Justice Robb not sitting.)

[fol. 33] Thursday, April 9th, A. D. 1936.

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

The argument in the above entitled cause was continued by Mr. H. C. Kilpatrick, attorney for appellant, and was continued by Mr. Thomas G. Carney, attorney for appellee, and was concluded by Mr. H. C. Kilpatrick, attorney for appellant. (Mr. Justice Robb not sitting.)

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6618

UNITED STATES ex Relatione, GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

Appeal from the Supreme Court of the District of Columbia

(Argued April 8 and 9, 1936. Decided May 18, 1936)

H. C. Kilpatrick, of Washington, D. C., for appellant.

Frank J. Wideman, Assistant Attorney General, Sewall Key, Robert H. Jackson, Norman D. Keller, and Thomas G. Carney, all of Washington, D. C., for appellee.

Before Martin, C. J., and Van Orsdel, Groner, and Stephens, JJ.

GRONER, J.:

John A. Brown, Jr., a citizen and resident of Pennsylvania, died testate in 1919. In his will he directed appellant, whom we shall call Girard, to take over his residuary estate in trust, collect the income and, after payment of certain expenses, to distribute the net to the extent of $200,000 annually to his widow, Harriet E. Brown. The widow elected, in compliance with the laws of Pennsylvania, to accept the income in lieu of her statutory share of the estate. Girard in the performance of the trust distributed to the widow the entire net income of the estate (which did not exceed $200,000 annually) for the years 1924 to 1930, inclusive; and, in computing the net taxable income of the estate for each of those years, it deducted the amount so distributed. (Section 219 (a) (2), Revenue Act of 1924 and corresponding sections of subsequent acts). The widow reported the amounts received by her as taxable income for the years 1924 to 1927, inclusive. She did not report as income the amounts received in 1928 and thereafter.

Between 1926 and 1928 three Circuit Courts of Appeals[1] held that income received by a widow, who had accepted such income in lieu of dower or statutory rights, was not taxable. "These cases held that by relinquishment of her rights, she came to occupy the position of the purchaser of an annuity." (290 U. S. 365, 369) The widow, relying on those decisions, filed claims[2] with the Commissioner for re- [fol. 35] fund of taxes which she had paid on the income distributed to her by Girard during the calendar years 1924 to 1927, inclusive. The Commissioner, also relying on the decisions, assessed[3] deficiencies—involving the same income distributed to the widow—against Girard for the years 1924 and 1925, on the ground that in computing the taxable net income of the trust the deduction by Girard of the amounts of income currently distributed to the widow had been improperly taken. (We assume the selection only of the years 1924-1925, was because of the approaching bar of the statute of limitations.) On appeal by Girard the Board sustained the Commissioner. The Commissioner, thereupon, September 17, 1931, paid the refund claimed by the widow, in an aggregate sum of approximately $78,000.00. However, in December following, Girard filed a petition for review of the decision of the Board as to it, but in lieu of bond paid the assessment against it with interest, in an aggregate amount of sixty-four thousand odd dollars. In April, 1933, the Court of Appeals in the Third Circuit[4] reversed the decision of the Board and held that the income payable to the widow was not taxable to Girard, and that the latter as trustee was authorized to deduct, as it had, the amount distributed to the widow, in making its return. Thereafter the Board, pursuant to the mandate of the court, entered its order July 7, 1934, finding that there were no deficiencies due from Girard for 1924 and 1925 but overpayments for such years in the aggregate amount of

---

[1] Warner v. Walsh, 15 F. (2d) 367; United States v. Bolster, 26 F. (2d) 760; Allen v. Brandeis, 29 F. (2d) 363.

[2] (March, 1929; August, 1929; January, 1931).

[3] (March, 1929).

[4] See Butterworth Case, 63 F. (2d) 944, a companion case to the Girard appeal, the ruling in which resulted in a reversal of the Board in the Girard appeal.

its 1932 cash payment made, as we have seen, in lieu of bond,—plus a further and later payment of around four thousand dollars for the year 1928.

In December, 1933, the Supreme Court decided Helvering v. Butterworth, 290 U. S. 365, settling the conflict in the Circuits and holding that such income as is here involved was taxable against the widow. The result of this was to invalidate the refund made by the Commissioner to the widow. But the statute of limitations had, in September, 1933, run against recovery from the widow. In this state of the case, the Commissioner declined to refund to Girard the taxes erroneously collected from it; and the purpose of this suit is to require the Commissioner to make repayment in compliance with the decision of the Board, which long ago became final.

Laying aside for the time being the technical aspect of the question, and having regard only to the ultimate facts, the case is this: Mrs. Brown owes the United States a large amount of money for taxes. The statute of limitations has intervened, and the government cannot collect. On the other hand, her trustee, Girard, has paid to the United States a large amount of money for taxes for which it was not liable and which the Board has determined it is entitled to recover. The money, however, which it mistakenly paid belonged to Mrs. Brown and, if recovered, will be payable to her; so that if we shall order the lower court to issue the writ, the result will be to require the United States to pay over money which—while technically that of Girard—actually would go to Mrs. Brown. Obviously this is inequitable and ought not to be done unless required as a matter of law. In saying this much, we are not influenced [fol. 36] by the fact that the government is itself a party or that the subject we are dealing with is taxation. The result to be reached should be wholly uninfluenced by those facts. When the United States is properly a party in a litigation in its own courts, it occupies no different or better position than the humblest citizen. Overreaching on its part should be no more condoned than if practiced by an individual. We have said as much before. O'Laughlin v. Helvering, 81 F. (2d) 269. Impelled by these considerations, we proceed to a discussion of the case as made.

First. We are told by counsel for Girard that the Commissioner's duty to refund the overpayments is mandatory.

It is said that under Sec. 1001 of the Revenue Act of 1926, as amended by Sec. 603 of the Revenue Act of 1928, when the taxpayer loses his case before the Board and appeals to the court, he may either file a bond to stay collection or pay the amount claimed with the assurance that it will be returned to him if his appeal is successful—without the necessity of following the technical procedure of filing a claim as in the case of an ordinary taxpayer; in short, that payment under these circumstances is in the nature of a cash deposit in lieu of a surety bond. This is, we think, a correct statement of the law. Girard, having elected to pay rather than give a bond and having won its case in the Court of Appeals, was entitled when the decision of that Court became final—assuming that no other taxes were claimed and shown to be due—to a refund of the amount paid. This we said in McCarl v. Leland, 42 F. (2d) 346.

Undoubtedly, as we think, the decision of the court and the finding of the Board made mandatory the duty of the Commissioner to make the refund. Blair v. United States, 6 F. (2d) 484; James v. United States, 38 F. (2d) 140. We are, therefore, compelled to reject the proposition of the Commissioner that the statute authorizing refunds, under the circumstances we have mentioned, involves the exercise of judgment and discretion.

Second. We likewise find ourselves in disagreement with the Commissioner on the point that Girard has an adequate remedy at law. The suggestion that it could, by action in the Court of Claims or the District Court, enforce payment of its claim against the United States, is without force. It has a judgment or the equivalent of a judgment in the order of the Board of Tax Appeals—now final—and nothing it could obtain from either the Court of Claims or a District Court would be any more adequate or specific. The statute imposes on the Commissioner the duty of making payment in accordance with the final determination of the Board; and if, as we think, this duty is mandatory, the writ here prayed for is an appropriate remedy. See Houston v. Ormes, 252 U. S. 469, 472; Cole v. Helvering, 64 App. D. C. 35, 73 F. (2d) 852; McCarl v. Leland, 59 App. D. C. 362, 42 F. (2d) 346; Lucas v. Blackstone, 59 App. D. C. 389, 45 F. (2d) 291. And if it can be shown that it ought to issue, it is of no consequence that another remedy in another tribunal might produce the same result. Knox

County v. Aspinwall, 24 How. 376, 385; Blair v. United States, supra.

Third. This brings us to consider the only remaining ground of defense, which is that Girard, in equity and good conscience, is not entitled to the writ of mandamus. In support of this position, the Commissioner says that Girard and the widow are the same parties in interest and [fol. 37] should be treated, in a petition addressed to the conscience of the court, precisely as though the claim of the government against the widow was in fact a claim against Girard. In reaching the conclusion we have reached we shall assume, as Girard insists, that ordinarily a final decision of the Board of Tax Appeals that an overpayment has been made, is conclusive between the parties. Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 727. But we cannot assume, as is contended by Girard, that because the Commissioner—before the Board—failed to interpose the defense he now makes here, he is estopped to make it anywhere else. The erroneous refund to the widow was not a question within the Board's jurisdiction. Its statutory authority goes no farther than the ascertainment that the taxpayer has made an overpayment and is entitled to a refund. But we do not rest our decision on that point alone, but also, and more particularly, upon the ground that the writ of mandamus is not a writ of right, but is awarded only in the exercise of a sound judicial discretion and to compel the performance of an act which in equity and good conscience ought to be performed. Stated otherwise, the granting of the writ does not follow of necessity the showing of a legal right. United States v. Dern, 289 U. S. 352, 359. Even in such circumstances, it should be denied if the result will be to accomplish a moral wrong. "It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit." Duncan Townsite Co. v. Lane, 245 U. S. 308, 311. We may, therefore, grant Girard's contention that there is no statute permitting the overpayment of tax by one taxpayer to be set off against a tax due from another taxpayer, and we may lay aside altogether the disputed legal right of the United States to a counterclaim or recoupment. We may concede, further-

more, that the claim of the United States against the widow is not a claim for taxes but a claim for money erroneously paid and that there is nothing in the statute which permits the money due Girard to be credited against the taxes due by the widow,—and we may grant that, by reason of the running of the statute, the United States is wholly without a right to credit on the one hand or collect on the other. But we nevertheless get back to the single proposition whether, in a case like this, the court ought to exercise the power, which ordinarily it has, to compel the doing of the thing which Girard asks.

There is no charge of fraud or bad faith in this case. Both Mrs. Brown and the Commissioner acted on the natural and reasonable assumption that the law had been definitely settled by the decisions in the three Circuits. It is true that, when a different Court of Appeals decided that the Commissioner had erroneously assessed and collected the tax from Girard, there was still time in which to bring suit against Mrs. Brown to get back the money the Commissioner had mistakenly refunded to her. But in the meantime the conflict of view in the several Circuits had been submitted to the Supreme Court. The Commissioner, instead of acting on the safer side, awaited the decision of that Court. We do not think his inaction in this respect should be characterized as so gross as to create in this proceeding equities in favor of the widow or to destroy the [fol. 38] equities in favor of the United States. Mrs. Brown owes the United States a larger sum of money than the sum involved in the proceeding. If the latter sum had been paid to the Commissioner by her rather than by her trustee, clearly she would not now be able to recover it. But here it is insisted that, because the trustee is a distinct and separate entity and because the assessment was made against it and the payment made by it, a different conclusion must be reached, even though it be conceded the money paid by it belonged to Mrs. Brown.

Anderson v. Wilson, 289 U. S. 20, 26, 27, and Wynne v. Commissioner, 77 F. (2d) 473, recognize the principle that the trustee and beneficiary are not identical; and Hulburd v. Commissioner, 296 U. S. 300, 305, applies the rule that one taxpayer may not be assessed to pay the taxes of another. But in the view we take these principles have no relation to the situation here. Keeping in mind the prin-

ciple that mandamus should never issue to work a public or private mischief, the rule in those cases gives place to that other rule—which is just as firmly established—that when necessary to prevent a wrong or do a right, courts in order to do equity will look through the shadow to the substance.

In Luckenbach S. S. Co., Inc. v. W. R. Grace Co., 267 Fed. 676, 681, a subsidiary corporation wholly owned by its parent breached its contract to furnish cargo space for the carriage of nitrates between Chile and the United States. The subsidiary was financially unable to respond, and in a suit against the parent, the latter was held liable on the ground that the two corporations were, in the circumstances, substantially one. Judge Knapp said:

"For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form."

Under a different state of facts, but to the same end, the Supreme Court, in Chicago R. Company v. Minneapolis Asso., 247 U. S. 490, said that courts "will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require". See, also, to the same effect: Abercrombie v. Brinkman, 293 Fed. 375; Lewis v. Fifth-Third National Bank, 274 Fed. 587.

Except for procedural differences, this case is identical with White v. Stone, 78 F. (2d) 136. In that case the proceeding was an action for money had and received—here for mandamus—but in each, to secure the refund of taxes assessed against and paid by trustees, not liable, for the benefit of the beneficiary, who was. There it was held the trustees could only recover by showing superior equities in their favor. We can think of no reason why the same rule should not apply here. In either case the moral obligation is the same. In disposing of the case, the court said:

"Mrs. Stone is alive and the sole beneficiary under the trust. If the trustees are allowed to recover, it will redound to her benefit, and it is agreed that, had the income

in question been taxed to her instead of to the trustees, she would have been required to pay a greater sum than will be offset by the allowance of this plea. Clearly no injustice will be done her by so doing. Furthermore, Mrs. Stone, the sole beneficiary, is the real plaintiff in interest, and equity and justice require that her tax liability should bo offset against the claim of the trustees."

[fol. 39] Girard's case has been presented and argued with force and ability and, if the answer depended only on the ascertainment of its legal rights, the conclusion would have to be in its favor; but, as we have shown, the remedy by mandamus is controlled by equitable principles. Considered from that point of view, to grant it here would not vindicate a right but do a wrong. Because of that, we think it is our duty to leave the parties as we find them.

Affirmed.

A true copy.

——— ———, Clerk, of the United States Court of Appeals for the District of Columbia.

[fol. 40] Monday, May 18th, A. D. 1936.

April Term, 1936

No. 6618

United States ex Relatione Girard Trust Company, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

Guy T. Helvering, Commissioner of Internal Revenue

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Su-

preme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

May 18, 1936.

Mr. Justice Robb took no part in the consideration or decision of this case.

[fol. 41] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1935

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

DESIGNATION OF RECORD ON PETITION FOR CERTIORARI

The Clerk will prepare the record for filing in the Supreme Court of the United States as follows:

1. The printed record in this Court.
2. The minute record of the argument of the cause.
3. The opinion.
4. The judgment.
5. This designation of record.
6. The Clerk's certificate.

H. C. Kilpatrick, Attorney for Appellant.

Served copy of within designation on attorney for Respondent this 17th day of July, 1936.

H. C. Kilpatrick (F. A. B.), Attorney for Petitioner.

Endorsed: No. 6618. United States ex relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., deceased, Appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. Designation of Record on the Petition for Certiorari. United States Court of Appeals for the District of Columia. Filed July 17, 1936. Moncure Burke, Clerk.

[fol. 42] [Endorsed:] In the United States Court of Appeals for the District of Columbia, October Term, 1935. No. 6618. United States ex Relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., Deceased, v. Guy T. Helvering, Commissioner of Internal Revenue. Designation of Record on the Petition for Certiorari. United States Court of Appeals for the District of Columbia. Filed Jul. 17, 1936. Moncure Burke, Clerk.

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and tyewritten pages numbered from 1 to 42, inclusive, constitute a true copy of the transcript of the record and proceedings of the said Court of Appeals as designated by counsel for Appellant in the case of United States ex relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., deceased, Appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue, No. 6618, April Term, 1936, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Twenty-second day of July, A. D. 1936.

Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, by C. Preston Gainor, Assistant Clerk. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
AUG 14 1936
CHARLES ELMORE CR
CL

Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CHARLES MYERS,
H. C. KILPATRICK,
Counsel for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Reasons Relied on for Allowance of Writ	5
Brief in Support of Petition for Certiorari	7
I. Opinions of the Courts Below	7
II. Jurisdiction	7
III. Statement of the Case	8
IV. Specifications of Errors	8
V. Statutes Involved	9
VI. Argument	9
1. The decision below is in conflict with a decision of the Court of Appeals for the Second Circuit	9
2. The Court below has decided the following important questions of federal law which should be settled by this Court	11
(a) That statutory limitations on assessment and collection of taxes may be disregarded where their observance would appear to the Court to be inequitable	11
(b) That refund of amount paid in lieu of bond on appeal from Board of Tax Appeals may be withheld by Commissioner, although Appellate Court disallows the deficiency so paid	14
(c) That Commissioner may defeat refund or credit of overpayment determined by Board on ground not asserted before the Board	15
(d) That refund of overpayment to trustee may be defeated by claim against beneficiary of trust	17
(e) Summary	20
VII. Conclusion	20
Appendix	21

AUTHORITIES.

1. Cases.

Page

Anderson v. Wilson, 289 U. S. 20, 77 L. ed. 1004 ..... 18, 19
Arnold v. United States, C. C. H. 1935 Fed. Tax Serv., Vol. 3-A, p. 9382 18

Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, 71 L. ed. 676 ..... 12, 14
Brewerton v. United States, 9 F. Supp. 503 13
Bull v. United States, 295 U. S. 247, 79 L. ed. 1421 10

Daube v. United States, 1 F. Supp. 771 13
Daube v. United States, 289 U. S. 367, 77 L. ed. 1261. 13, 14

Ellay Co. v. Bowers, 25 F. (2d) 637 13

First Nat. Bank of Birmingham v. United States, 12 F. Supp. 301 19
Foundation Co. v. United States (Ct. Cls. unreported) 13

Gossett, James P., 22 B. T. A. 1279 16
Gould v. Evansville & Crawfordsville R. Co., 91 U. S. 526, 23 L. ed. 416 16
Graham v. Goodcell, 282 U. S. 409, 75 L. ed. 415..... 12

Hulburd v. Commissioner, 296 U. S. 300, 80 L. ed. 166 19

Local Loan Co. v. Hunt, 292 U. S. 234, 78 L. ed. 1230.. 11

Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 73 L. ed. 918 16

Roebling v. Commissioner, 28 B. T. A. 644..... 18
Russell v. United States, 278 U. S. 181, 73 L. ed. 255. 12, 13

Sugar Creek Coal & Mining Co. v. Commissioner, 31 B. T. A. 344 14

Tait v. Western Maryland R. Co., 289 U. S. 620, 77 L. ed. 1405 16
Toxaway Mills v. United States, 61 Ct. Cls. 363..... 13

United States v. American Exchange Irving Trust Co., 43 F. (2d) 829 13
United States v. Irving Trust Co., 77 F. (2d) 852... 5, 9, 10
United States v. John Gallagher Co., 83 F. (2d) 368... 12

Page

White v. Stone, 78 F. (2d) 136 19
Wynne, et al., v. Commissioner, 77 F. (2d) 473..... 18

2. Statutory Provisions.

U. S. C. A., Tit. 28, Sec. 347 7

Revenue Act of 1924:

Section 2(a) (1) 26
2(a) (9) 26
219 ..... 2, 17, 25
277 21

Revenue Act of 1926:

Section 2(a) (1) 26
2(a) (9) 26
219 ..... 17, 25
374 ..... 3, 23
277 ..... 22, 23
284 ..... 15, 24, 25
1001 ..... 3, 14, 23
1005 ..... 3, 4, 25

Revenue Act of 1928:

Section 161-2 ..... 17, 25
275 22
322 ..... 15, 25
607 ..... 12, 13, 21
609 ..... 12, 13, 21
610 22
701(a) 26

3. Miscellaneous.

I. T. 2020, Int. Rev. C. B. III-1, p. 348..... 18
McGuire and Zimet, "Hobson's Choice and Similar Practices in Federal Taxation" 11

Supreme Court of the United States

OCTOBER TERM, 1936

No. .....

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

May It Please the Court:

The petition of United States, Ex Relatione, Girard Trust Company, as trustee under the will of John A. Brown, Jr., deceased, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Relator seeks review of a decision of the United States Court of Appeals for the District of Columbia, rendered May 18, 1936 (R. 40), affirming the judgment of the Supreme Court of the District of Columbia, dismissing a petition for

mandamus brought to compel the Commissioner of Internal Revenue to refund overpayments of income taxes in amounts determined by the Board of Tax Appeals. The defense interposed and sustained by the court below was a plea that it would be inequitable to compel refund of these overpayments to the relator because a beneficiary of the trust estate had received erroneous refunds of her income taxes for some of the years involved, as well as for other years, and had failed to pay taxes due for one of these years, the government being barred by the statute of limitations from recovering such erroneous refunds and from collecting such taxes.

The material facts are as follows:

Relator is trustee under the will of John A. Brown, Jr., deceased, who died July 17, 1919, a resident of Newtown Township, Pennsylvania, leaving a last will and codicil thereto, by the terms of which his residuary estate was bequeathed to relator, in trust, to collect the income and, after payment of certain expenses, to distribute the net, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, for life, and any excess above that amount to his children (R. 2-3, 15).

Decedent's widow duly elected to take under the will in lieu of taking the interest otherwise allowed her by the Pennsylvania law, and the property was delivered to relator upon the trusts named in December, 1920, since which time it has continued to act as such trustee (R. 3, 17).

During the years 1924 to 1930, inclusive, relator currently distributed to the widow the entire net income of the trust estate. Pursuant to the requirements of Section 219 of the Revenue Act of 1924 and corresponding provisions of the 1926 and 1928 Acts (see appendix, pp. 25-26), relator duly filed with the Collector of Internal Revenue a return of income for the trust estate for each of such years, deducting from the gross income the amounts so distributed to the widow. The widow, in turn, in her income tax returns, reported all such distributions for the years 1924 to 1927, in-

clusive, and paid taxes thereon. For the years 1928 to 1930, inclusive, she did not include such distributions in her taxable income, and the Commissioner did not require her to do so (R. 3, 17, 24).

On March 15, 1929, the Commissioner of Internal Revenue, pursuant to the provisions of Section 274 of the Revenue Act of 1926, notified relator of alleged deficiencies in income taxes of the trust estate for the years 1924 and 1925, resulting from the Commissioner's disallowance of the deduction of amounts so distributed to the widow. Relator, on May 11, 1929, duly filed with the United States Board of Tax Appeals an appeal from the Commissioner's determination in this regard. The Board on June 23, 1931, entered a decision sustaining the Commissioner's determination that such deductions should be denied, and computing the resulting deficiencies at $30,278.28 for 1924 and $16,580.85 for 1925. Relator, on December 21, 1931, filed with the United States Circuit Court of Appeals for the Third Circuit a petition for review of the Board's decision, and on April 26, 1933, the appellate court reversed the Board (R. 3-4, 18). Meanwhile, pending review, relator on February 10, 1932, had paid the amounts determined as deficiencies by the Board, together with interest of $18,279.01 (R. 4, 18), in lieu of filing a bond to stay collection, under the provisions of Section 1001 of the Revenue Act of 1926 (see appendix, p. 23).

Pursuant to the mandate of the appellate court, the Board on July 7, 1934, entered its decision, wherein it ordered and decided that there were no deficiencies due from relator for 1924 or 1925, but that in fact, there were overpayments for such years in the respective amounts paid on February 10, 1932 (R. 4, 18). That decision became final on August 7, 1934, under the provisions of Section 1005 of the 1926 Act (see appendix, p. 25).

A similar deficiency notice was sent relator on January 22, 1931, asserting a deficiency for the year 1928. On March 6, 1931, relator appealed to the Board of Tax Appeals, which

entered its decision, on stipulation of the parties, on September 29, 1934, determining that relator had overpaid its taxes for that year in the amount of $4,376.29. No petition for review of that decision was filed (R. 4-5, 19), and it became final on December 29, 1934, under section 1005, *supra* (see appendix, p. 25).

There are no income, war-profits, or excess-profits taxes, or instalments thereof, due from relator, as such trustee, for any year or period (R. 5, 19, 23-25), against which respondent could credit these overpayments. Nevertheless, respondent refused to refund the overpayments in question. Relator's petition for mandamus seeks to compel him to do so. In answer to the petition, respondent denied the Court's jurisdiction (R. 21-22), and defended his failure to refund the overpayments by asserting that such refund would be contrary to equity and good conscience. This defense is based upon the following facts (R. 23-24):

The widow received income from the trust, as aforesaid, and for the years 1924 to 1927, inclusive, paid income taxes thereon. However, she later filed claims for refund of most of the taxes so paid, on the ground that, as a matter of law, this income represented the return to her of the value of her dower and statutory rights, which she had relinquished when she elected to take under decedent's will, and therefore was not taxable income in her hands. The Commissioner of Internal Revenue considered these claims and allowed substantially, though not exactly, the amounts claimed, refunding to her in September, 1931, an aggregate of $60,636.12 as taxes paid on such income for the years 1924 to 1927, inclusive, together with statutory interest thereon. Of this amount, the refund of tax for 1924 was $24,807.99 and for 1925 $11,903.18.

During 1928, the widow received income from the trust, but in good faith did not treat it as taxable in her return. If it had been included, the tax thereon would have been $4,376.39. The Commissioner and his agents examined this

return and, with full knowledge of the facts, accepted it as correct (R. 24).

It is said that the Commissioner's action in refunding taxes to the widow for the years 1924 to 1927, inclusive, and in approving her 1928 return, resulted from an error of law on his part, honestly concurred in by the widow; that she has been unjustly enriched by reason of these circumstances; that she and the relator "are the same parties in interest"; that the relief herein prayed, if granted, would inure to her sole benefit; and that, in equity and good conscience, respondent should not be directed to refund to relator any amount in excess of the amounts now alleged to be justly due and owing from the widow (R. 25).

A demurrer to the answer (R. 26-29) was overruled by the trial court and, the relator electing to stand thereon, the petition was dismissed (R. 29). On appeal by relator, the Court of Appeals, while overruling respondent's objections to the jurisdiction (R. 35-37), sustained the validity of the last-mentioned plea and affirmed the order of dismissal (R. 40).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision below is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Irving Trust Company*, 77 Fed. (2d) 852, in that the court below held that the Government may use a claim barred by the statute of limitations as a set-off against a taxpayer's claim for refund of an overpayment of tax for a different taxable year.

2. The court below has decided the following important questions of federal law which have not been, but should be, settled by this court:

(a) That refund of an overpayment of taxes to a taxpayer who, with the acquiescence of the United States, in good faith and without misrepresentation, failed to pay

other taxes of equal amount now barred from collection by the statute of limitations, would be "inequitable" and will not be required by writ of mandamus;

(b) That the Commissioner may refuse, despite the provisions of Section 1001(d) of the Revenue Act of 1926, to credit or refund the amount of a tax deficiency determined by the Board of Tax Appeals and paid in lieu of bond pending review by a Circuit Court of Appeals, where the court disallows the deficiency determined by the Board;

(c) That, after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner, in a proceeding against him to require a refund of the overpayment, may defeat such refund on grounds not asserted before the Board; and

(d) That a valid claim for refund of overpayment of income taxes by a trustee, in its fiduciary capacity, may be set off or credited against or absorbed by a claim on behalf of the Government against a beneficiary of the trust.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6618, October Term, 1935, United States Ex Relatione, Girard Trust Company, Trustee under the Will of John A. Brown, Jr., Deceased, appellant, v. Guy T. Helvering, Commissioner of Internal Revenue, appellee, and that the said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased,

By H. C. KILPATRICK,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1936

No. .....

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no opinion by the Supreme Court of the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported, but appears in the record at pages 33 to 40.

II.

JURISDICTION.

1. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 240, as amended by Act of Congress, February 13, 1925, 43 Stat. 938 (U. S. C. A., Tit. 28, Sec. 347).

2. The judgment sought to be reviewed was entered May 18, 1936 (R. 40).

III.

STATEMENT OF THE CASE.

The case was tried and decided on demurrer to the answer (R. 29). A concise statement of the case has been given under the heading "A" in the petition for certiorari (pages 1-5, *supra*), and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Court of Appeals erred in holding that a trustee is not entitled to a writ of mandamus commanding the Commissioner of Internal Revenue to refund overpayments of income tax found to be due it by final decisions of the Board of Tax Appeals, if it appears that a beneficiary of the trust, with the acquiescence of the United States, in good faith, and without intent to defraud, obtained erroneous refunds of income tax for some years and failed to pay income tax for other years, which in the aggregate exceeded the amount of the overpayments due the trustee and which are barred from recovery from the beneficiary by the applicable statutes of limitations.

(2) The Court of Appeals erred in holding that a claim of the United States to recover erroneously refunded income tax, which is barred from collection by the statute of limitations, may be set off against a valid claim for refund of income tax for a different taxable year.

(3) The Court of Appeals erred in holding that a court may disregard statutory limitations on the assessment and collection of taxes and recovery of erroneous refunds of taxes, because it believes that the observance of such limitations would be inequitable, there being no charge of fraud or bad faith on the part of the taxpayer.

(4) The Court of Appeals erred in holding that, where a taxpayer, in lieu of filing bond, pays a deficiency determined by the Board of Tax Appeals pending review of the Board's decision by a circuit court of appeals, and where the court disallows the deficiency so determined by the Board, the Commissioner may not be required to refund such payment to the taxpayer.

(5) The Court of Appeals erred in holding that after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner may, in a proceeding against him to require refund of such overpayments, defeat such refund on grounds not asserted before the Board.

(6) The Court of Appeals erred in holding that a valid claim for refund of overpayments of income taxes by a trustee, in its fiduciary capacity, may be set off or credited against a claim of the government against a beneficiary of the trust.

(7) The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia.

V.

STATUTES INVOLVED.

The statutes involved, and the proposition for which each is cited, appear in the appendix, pp. 21-26, *infra*.

VI.

ARGUMENT.

1. The Decision Below is in Conflict With the Decision of the United States Circuit Court of Appeals for the Second Circuit in United States v. Irving Trust Company, 77 Fed. (2d) 852.

In the *Irving Trust* case a bankrupt corporation had overpaid its income taxes for 1931, but three-fourths of the amount of the overpayment (the tax having been paid in instalments) was barred from refund because of the bank-

rupt's failure to file a claim within the prescribed statutory period. The bankrupt had underpaid its taxes for 1926, and the government filed a timely claim for the deficiency in the bankruptcy proceeding. The trustee moved to set off the entire 1931 overpayment against the 1926 deficiency. This was allowed by the trial court, but the Court of Appeals reversed, holding that only that part of the overpayment which was not barred from refund could be so set off, on the ground that an overpayment "cannot be used as a set off unless it constitutes an allowable refund." The decision of this Court in *Bull* v. *United States*, 295 U. S. 247, 79 L. ed. 1421, was distinguished on the ground that the 1931 overpayment did not arise out of some feature of the transaction upon which the government's claim for 1926 was grounded.

In the instant case the overpayments by petitioner were overpayments for the years 1924, 1925 and 1928, aggregating in principal and interest, $69,514.53 (R. 4, 5),[1] whereas the claims of the government against the beneficiary for the same years aggregated only $53,476.84 (R. 24).[2] The Commissioner's refusal to refund the excess was approved because of claims against the widow for 1926 and 1927 aggregating $29,124.40 (R. 24).[3] Conceding for purposes of the present point the identity of trustee and beneficiary, the decision in the instant case is squarely in conflict with

[1]

Year	Principal	Interest	Total
1924	$30,278.28	$12,453.91	$42,732.19
1925	16,580.85	5,825.10	22,405.95
1928	4,376.39	.....	4,376.39
		Aggregate	$69,514.53

[2]

1924	24,807.99	8,762.62	33,570.61
1925	11,903.18	3,626.66	15,529.84
1928	4,376.39	.....	4,376.39
			$53,476.84

[3]

1926	12,958.15	3,173.77	16,131.92
1927	10,966.80	2,025.68	12,992.48
		Aggregate	$29,124.40

United States v. *Irving Trust Co., supra*, in that it permits a stale claim for erroneously refunded income taxes for one year to be interposed as a defense to the refund of admitted overpayments of such taxes for other and different taxable years. The cases are parallel because, as pointed out by the court below, the determination of relator's right to a writ of mandamus is governed by equitable principles, and the same principles apply to bankruptcy proceedings. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240, 78 L. ed. 1230, 1233.

In this respect the decision below is without precedent, and invites litigation in every case where either the taxpayer or the taxing officials can discover barred claims for any period in the remote past. Two eminent writers on the subject (*McGuire and Zimet, "Hobson's Choice and Similar Practices in Federal Taxation", XLVIII Harv. Law Rev., 1279, 1327*) have tersely described the effect of such a decision:

> "Start jumping the boundaries of the very year to which the refund claim applies, and there will be no stopping point short of the extreme temporal limits of financial relations between taxpayer and government. Such acrobatics outrage conventional notions of legal repose."

2. Important Questions of Federal Law Which Should Be Settled.

The court below has decided the following important questions of federal law which have not been, but should be, settled by this Court:

(a) That a court may disregard statutory limitations on the assessment and collection of taxes and recovery of erroneous refunds of taxes, because it believes that the observance of such limitations would be inequitable, there being no charge of fraud or bad faith on the part of the taxpayer.

Under Sections 607 and 609 of the Revenue Act of 1928 (appendix, p. 21), any tax assessed or paid after the expiration of the applicable period of limitation, whether originally due or not, and whether paid voluntarily or involuntarily, must be credited or refunded, and any attempt to accomplish collection of a stale claim by credit against an amount due the taxpayer is denounced as void. Where such a credit is made the taxpayer may sue and recover the amount credited, regardless of his original liability to pay the barred taxes. *United States* v. *John Gallagher Co.*, 83 Fed. (2d) 368. The decision of the court below that the Commissioner, although thus denied the right to *credit* an overpayment against a barred deficiency claim, may defeat recovery of the overpayment upon a mere showing that such a barred claim exists, is, to say the least, anomalous. *Graham* v. *Goodcell*, 282 U. S. 409, 423, 75 L. ed. 415, 437.

Obviously, had the beneficiary here paid her taxes after the time for assessment and collection had expired, the Commissioner would have no ground whatever for refusing payment of the refunds due the petitioner. But, under Section 607, the beneficiary could then recover her payment without question, because paid after the period of limitations, and the result would be exactly the same as that which the Court of Appeals has denounced as unconscionable. The result in each instance flows from statutory provisions that official inaction over a stated period of time shall wipe out all liability on the part of the taxpayer. *Russell* v. *United States*, 278 U. S., 181, 187, 73 L. ed. 255, 257.

In short, the decision below denounces the inevitable operation of a clear statutory provision as "inequitable", and brands as "unconscionable" the petitioner's demand that the statute be obeyed. In this respect the decision is wholly at variance with numerous decisions that a tax collected after the bar of the statute has fallen must be refunded. *Cf. Bowers* v. *N. Y. Albany Lighterage Co.*, 273 U. S. 346, 71 L. ed. 676.

In *Toraway Mills* v. *United States*, 61 Ct. Cls. 363, 373, it was held that a taxpayer could not recover taxes paid after limitation on collection had expired, unless he could show that "the government *ex aequo et bono* is bound to refund the amount which he paid." Although that decision was prior to the enactment of Sections 607 and 609 of the 1928 Act, above discussed, this Court reversed on confession of error by the Solicitor General, 273 U. S. 781, 71 L. ed. 889. Since that time, there has been no dissent from the view that a tax collected after the bar of the statute has fallen must be refunded, without regard to any supposed "equities" arising from the fact that the tax was originally due. *Russell* v. *United States, supra; United States* v. *American Exchange Irving Trust Co.*, 43 Fed. (2d) 829, 830; *Ellay Co.* v. *Bowers*, 25 Fed. (2d) 637, 638-9; *Brewerton* v. *United States*, 9 Fed. Supp. 502, 508; *Daube* v. *United States*, 1 Fed. Supp. 771, affirmed 289 U. S. 367, 77 L. ed. 1261.

When we consider the power given the Commissioner to levy jeopardy assessments,[4] his action not being subject to judicial review,[5] it will be apparent that the decision below permits the Commissioner to avoid the limitations on assessment at will. That is, if he finds that the statute bars collection of a 1932 tax, he may levy and collect a jeopardy assessment on arbitrary grounds for a subsequent year not so barred, and in defense of a suit for refund of the latter, rely upon the "equitable" consideration that the barred claim for 1932 exceeds in amount the valid claim for refund of taxes for the later years. If such results are to follow the decision below, the legislative purpose "to require more prompt action upon the part of the Commissioner and Collectors", and "to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made

[4] Title 26 U. S. C. A., Sec. 273 and "Historical Note".

[5] *The Foundation Co.* v. *United States*, decided by the Court of Claims June 1, 1936, not yet officially reported.

and pressed within" the statutory period (*Bowers* v. *N. Y. & Albany Lighterage Co., supra*) will be frustrated.

"High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended." *Daube* v. *United States*, 289 U. S. 367, 372, 77 L. ed. 1261, 1264. The statutory limitation upon collectibility of taxes, in the absence of fraud or conscious deception," may not give way to an elusive concept of fairness." *Sugar Creek Coal & Mining Co.* v. *Commissioner*, 31 B. T. A. 344, 347.

(b) That, where a taxpayer upon appeal from the Board of Tax Appeals, in lieu of filing bond, pays the deficiency determined by the Board, and the appellate court thereafter disallows the deficiency, the Commissioner may not be required to refund the payment to the taxpayer.

Section 1001 (appendix, p. 23) prescribes the method for judicial review of decisions of the Board of Tax Appeals. The taxpayer may file a surety bond and stay collection, or he may pay the deficiency pending review. If he adopts the latter course, and if the court disallows the deficiency determined by the Board, his deposit is to be returned to him by credit or refund "without the making of claim therefor." The intention of Congress seems clear: that such a payment pending review shall be treated as being a deposit "in lieu of bond", as the opinion below (R. 34-35) describes it. However, the court below holds that, even where there is no right to credit, the Commissioner may refuse refund of such a payment on the basis of a defunct and unenforceable claim of the government against the taxpayer for other years.

If payment of a deficiency pending review is to lift the bar of the statute of limitations and place upon the taxpayer the burden of defending not alone the immediate threatened imposition, but any and all barred claims for

any year in the remote past that government officials might chose to assert, the result will be that no taxpayer will dare adopt this alternative, which apparently was provided for his benefit. Furthermore, under this theory, questions presented to the courts of appeal and to this Court in cases originating in the Board of Tax Appeals might be moot unless the taxpayer were able to furnish a surety bond to stay collection.

To say that the "inequity" of permitting a taxpayer to escape payment of a liability justifies such a rule is to say that statutes of limitation, designed to put an end to disputes, may be ignored wherever the barred claim was originally a valid one, but may be enforced only where the alleged debtor is able to show that he never owed the money and therefore does not need the protection of the statute. Aside from this absurd consequence, the decision below overlooks the obvious inequity inherent in a situation where the taxpayer, invited by statute to pay the amount in controversy pending settlement of his rights, upon accepting that invitation, finds himself entrapped by the statute and his money retained to satisfy collateral and otherwise unenforceable claims.

(c) That, after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner, in a proceeding against him to require a refund of the overpayment, may defeat such refund on grounds not asserted before the Board.

In each of the proceedings before the Board of Tax Appeals, the Board entered a decision that relator had overpaid its taxes. In each case, that decision has long since become final. Section 284 of the 1926 Act and Section 322 of the 1928 Act (appendix, pp. 24-25) provide that amounts so determined shall be credited or refunded to the taxpayer. But the Commissioner here has refused either to credit or refund such overpayments, and seeks to excuse

his inaction by asserting in this proceeding claims against a beneficiary of the trust, not only for taxes but for the recovery of erroneous refunds for the same years in which relator overpaid its taxes (1924, 1925 and 1928), as well as claims for erroneous refunds for other years (1926 and 1927). This defense, sustained by the Court of Appeals, assumes the identity of trustee and beneficiary as the same "taxpayer", a point hereinafter discussed. If this assumption be invalid, of course, the decision is clearly wrong. However, if it be valid, other serious questions immediately arise.

As to the years involved in the proceedings before the Board, if the trustee and the beneficiary constituted one and the same taxpayer, the Commissioner could have asserted before that tribunal his claims against the beneficiary, just as he might have defended his position on the basis of any error in computation of the income of the taxpayer. *James P. Gossett*, 22 B. T. A. 1279, 1284. Having failed then to assert this defense, may the Commissioner now be heard to say, in effect, that there were no actual overpayments for the years in question, because of underpayment by the beneficiary?

That the doctrine of *res judicata*, or estoppel by judgment, applies to the decisions of the Board is definitely settled by the decision in *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 77 L. ed. 1405. "Except in special cases the plea of *res judicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Gould* v. *Evansville & Crawfordsville R. Co.*, 91 U. S. 526, 533; 23 L. ed. 416, 418.

In *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716, 73 L. ed. 918, in discussing appeals to the Board and review of the Board's decisions by the courts, it was said:

"The complete purpose of Congress to provide a final adjudication in such proceedings, binding all parties, is manifest."

The decision below, therefore, appears to be based upon an entirely different concept of the effect of decisions of the Board than that appearing in the opinions of this Court dealing with the subject. If the decision below is not reviewed, doubt and uncertainty will exist as to the extent to which final decisions by the Board, and by the courts on review, may be attacked in collateral proceedings. The most obvious effect will be for the taxpayer to seek to avoid payment of a deficiency determined by final decision of the Board on the basis of some defense overlooked at the time of trial by the Board.

(d) That a valid claim for refund of an overpayment of income taxes by a trustee, in its fiduciary capacity, may be defeated by a claim on behalf of the government against a beneficiary of the trust.

Section 219 of the Revenue Act of 1924 (identical in substance with Section 219 of the 1926 Act and Sections 161-162 of the 1928 Act—see appendix, p. 25) subjects the income of trust estates to the income taxes levied on individuals, but uses a different method of computing income. The fiduciary makes a separate return and pays the tax on all trust income except that which is distributable to the beneficiary. Distributable trust income is included in the beneficiary's return, along with income from all other sources, and may be offset by deductions having no connection with trust income. Thus there may be wide variance between the rate of tax applicable to trust income taxable to the estate and such income taxable to the beneficiary. Controversy over the taxable income of the one may extend far beyond the period of limitation on assessment against or refund to the other. It has been held repeatedly, by admin-

istrative rulings, as well as by judicial decisions, that the revenue laws deal with trustee and beneficiary as separate taxpayers, and that mere identity of economic interest does not permit the mingling of the accounts of separate taxpayers, either for the purpose of computing tax liability or for the purpose of determining the right of one of them to a refund. In *I. T. 2020,* Internal Revenue Cumulative Bulletin III-1, page 348, it was held that an overpayment of income taxes by the executor and sole beneficiary of a trust estate for 1918 could not be applied against additional taxes due for the same year by the estate. The Circuit Court of Appeals for the Fifth Circuit reached the same conclusion in *Wynne et al.* v. *Commissioner,* 77 Fed. (2d) 473, as did Judge Dickinson of the Eastern District of Pennsylvania in *Arnold* v. *United States,* C. C. H. 1935 Fed. Tax Serv., Vol. 3-A, p. 9382.[6] Conversely, an overpayment by the fiduciary may not be credited against a deficiency due by the beneficiary. *Roebling* v. *Commissioner,* 28 B. T. A. 644, 656. This Court, in *Anderson* v. *Wilson,* 289 U. S. 20, 77 L. ed. 1004, held that the income beneficiary of a trust estate could not deduct from gross income a pro rata part of the loss realized upon a sale by the trustee of part of the corpus of the estate.

All of these decisions are based squarely upon the ground that fiduciary and beneficiary are separate taxpayers. In the last cited case, this Court took cognizance of the argument that the result might involve hardship or inequity, saying (289 U. S. 27):

> "• • • In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. • • • We do not pause to consider whether a statute differently conceived and

[6] Pending on appeal to the Circuit Court of Appeals for the Third Circuit.

framed would yield results more consonant with fairness and reason. We take the statute as we find it."

The decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Stone*, 78 Fed. (2d) 136,[7] was the first case in which a contrary view was expressed with reference to trustee and beneficiary. That decision was followed in *First National Bank of Birmingham* v. *United States*, 12 Fed. Supp. 301 (D. C. Ala.).[8] In each of these cases the government's claims against the beneficiary were claims for taxes and were confined to the taxable years for which the trustee had overpaid its taxes, whereas in the instant case the claims are for recovery of erroneous refunds as well as for taxes, and cover years other than those for which the trustee paid excessive taxes.

More recently, this Court in *Hulburd* v. *Commissioner*, 296 U. S. 300, 80 L. ed. 166, held that a deficiency erroneously asserted against the executors of an estate in their fiduciary capacity could not form the basis for a judgment of deficiency against one of the executors in his individual capacity as a legatee. In that case, as in the instant case, the Commissioner based his claim upon an alleged right of recoupment, and relied upon *White* v. *Stone*, *supra*.

There are numerous cases pending in District Courts involving the same kind of question.[9] In view of the pronouncements of this Court in *Anderson* v. *Wilson* and *Hulburd* v. *Commissioner*, *supra*, it seems reasonable to predict that there will be conflicting decisions on the point. A review of the question by this Court at this time would obviate much unnecessary litigation.

---

[7] Certiorari denied (56 Sup. Ct. 112), but time for filing petition for rehearing extended to Nov. 2, 1936. See 56 Sup. Ct. 167, 245, and 950.

[8] Pending on appeal to the Circuit Court of Appeals for the Fifth Circuit.

[9] See list of such cases appended to brief in support of petition for certiorari in Stone v. White, No. 202, Oct. Term, 1935.

(e) Summary.

The questions above discussed are important questions of federal law which constantly will recur in the administration of the revenue laws. None of these specific questions has been considered by this Court, but the decision below is inconsistent with numerous decisions of this Court and of subordinate federal courts upon related questions, with the result that great confusion and doubt now exist concerning the effect of statutes of limitation upon the rights of the government and of taxpayers growing out of claims for deficiencies and refunds of federal taxes, as well as claims for the recovery of erroneous refunds. The decision also creates confusion with reference to the rights and liabilities created by final decisions of the Board of Tax Appeals.

VII.

CONCLUSON.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the conflict of the decision below with the decision of the Circuit Court of Appeals for the Second Circuit may be settled, and in order that the several novel and important questions of federal law which are decided by the Court of Appeals herein may be settled by this Court; and that, to such an end, a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

CHARLES MYERS,
H. C. KILPATRICK,
Counsel for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

APPENDIX.

Pertinent Statutory Provisions and Propositions for Which Cited.

(Italics Supplied)

I

Where a tax is paid after the period for collection has expired, it must be refunded.

Sec. 607, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2607:

> "Any tax • • • assessed or paid • • • after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and *shall be credited or refunded to the taxpayer* if claim therefor is filed within the period of limitation for filing such claim."

II

An attempted credit of an overpayment against a barred tax liability is void.

Sec. 609(a), Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2609(a):

> "• • • Any credit against a liability in respect of *any taxable year shall be void* if any payment in respect of such liability would be considered an overpayment under section 2607. • • •"

III

The statutory period for assessment against the widow had expired when this suit was filed.

Sec. 277, Revenue Act of 1924; Title 26 U. S. C. A. (1925 Ed.) Sec. 1057 note:

> "• • • The amount of income taxes imposed by this chapter *shall* be assessed within four years after the return was filed, *and no proceeding in court* for the

collection of such taxes *shall be begun* after the expiration of such period."

Sec. 277, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1057 (a)(1):

"• • • The amount of income taxes imposed by this chapter *shall* be assessed within three years after the return was filed, and *no proceeding in court* without assessment for the collection of such taxes *shall be begun* after the expiration of such period."

Sec. 275, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2275 (a):

"The amount of income taxes imposed by this title *shall* be assessed within two years after the return was filed, and *no proceeding in Court* without assessment for the collection of such taxes *shall be begun* after the expiration of such period."

IV

The statutory period for bringing suit against the widow for recovery of refunds to her had likewise expired.

Sec. 610, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2610:

"(a) Any portion of an internal revenue tax • • • refund of which is erroneously made, within the meaning of section 2608 (Note 1) after May 29, 1927, may be recovered *by suit brought in the name of the United States*, but only if such suit is begun *within two years after the making of such refund.*

"(b) Any portion of an internal revenue tax • • • which has been erroneously refunded (if such refund would not be considered as erroneous under section 2608) may be recovered *by suit brought in the name of the United States*, but only if such suit is begun before

---

Note 1: Section 2608 provides that a refund made (1) after the expiration of the time for filing claim, where no claim was filed, or (2) after the expiration of the time for filing suit upon a rejected claim, where no suit was filed, shall be considered erroneous.

the expiration of *two years after the making of such refund or before May 1, 1928*, whichever date is later • • •".

V

Where a deficiency determined by the Board is paid pending court review and the appellate court disallows such deficiency, the amount so paid must be credited or refunded to the taxpayer.

Sec. 1001, Revenue Act of 1926 as amended by Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 1224:

"(a) The decision of the Board rendered after February 26, 1926 • • • may be reviewed by a Circuit Court of Appeals • • • if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

• • • • • • • • • •

"(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review • • • is duly filed by the taxpayer, and then only if the taxpayer • • • has filed with the Board a bond • • • conditioned upon the payment of the deficiency as finally determined • • •.

"(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board, is disallowed in whole or in part by the court, *the amount so disallowed shall be credited or refunded to the taxpayer without the making of claim therefor.* • • •"

VI

Decisions of the Board are final and binding on all parties.

Sec. 274, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1048, 1048a (Note 2):

Note 2: By Section 283 of the 1926 Act, the provisions of section 274 apply to deficiencies asserted for years covered by prior acts, so this section applies to the years 1924 and 1925. Section 272 of the 1928 Act, applicable to the claim for 1928, is substantially identical with section 274 of the 1926 Act, and is not set out here.

"(a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * *, the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency * * *.

"(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final *shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.*"

Sections 284(d) and 284(e) of the 1926 Act; Title 26 U. S. C. A. (1925 Ed.) Sec. 1065:

"(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under section 1048 of this title and if the taxpayer after February 26, 1926, files a petition with the Board of Tax Appeals * * *, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—* * * (1) As provided in subdivision (e) of this section * * *.

"(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, *the Board shall have jurisdiction to determine the amount* of such overpayment, and such amount *shall*, when the decision of the Board has become final, *be credited or refunded to the taxpayer* as provided in subdivision (a). Unless claim for credit or refund, or the petition, was filed within the time prescribed * * * for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years * * * be-

fore the filing of the claim or the filing of the petition, whichever is earlier." (Note 3)

VII

Board's decision of overpayments for 1924 and 1925 became final on August 7, 1934, and for 1928 on December 29, 1934.

Sec. 1005, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1228:

"(a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review (Note 4), if no such petition has been duly filed within such time • • •"

• • • • • • • • • •

"(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if • • • the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, • • • then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final *on the expiration of thirty days from the time such decision of the Board was rendered* • • •."

VIII

Trustee and beneficiary are separate taxpayers.

Sec. 219, Revenue Act of 1924 (identical in substance with Sec. 219 of the 1926 Act, and Sections 161-162 of the 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 960, note:

"(a) The tax imposed by Parts I and II of this chapter (Note 5) shall apply to the income of estates or of any kind of property held in trust, including—

• • • • • • • • • •

Note 3: For the taxable year 1928 Section 322 of the 1928 Act (Title 26 U. S. C. A. (1925 Ed.) Sec. 2322 (d)) contains substantially the same provisions as are set out above from Section 284 of the 1926 Act, except that the period of limitation is two years.

Note 4: Three months, under sec. 1101 of 1932 Act; Title 26 U. S. C. A. (1934 Ed.) sec. 642.

Note 5: I. e., the income tax on individuals.

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries • • •.

"(b) Except as otherwise provided in subdivisions (g) and (h) (Note 6) *the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary.* The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 953 • • • (Note 7) except that—

• • • • • • • • •

"(2) There shall be allowed as an *additional* deduction in computing the *net income of the estate or trust* the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries • • • but the amount so allowed as a deduction *shall be included in computing the net income of the beneficiaries whether distributed to them or not* • • •"

Sec. 2(a)(1) Revenue Acts of 1924 and 1926 (identical with Sec. 701(a) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(1):

"The term 'person' means an *individual*, a *trust or estate*, a partnership, or a corporation."

Sec. 2(a)(9), Revenue Acts of 1924 and 1926 (identical with Sec. 701(a)(13) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(9):

"The term 'taxpayer' means any person subject to a tax imposed by this title."

Note 6: These subdivisions relate to revocable trusts and trusts where income is held for or distributed to the grantor of the trust.

Note 7: Section 953 prescribes the method for computing the net income of an individual.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF CONTRA RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES MYERS,
H. C. KILPATRICK,
Counsel for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

AUTHORITIES CITED.

	Page
Arant v. Lane, 249 U. S. 367, 63 L. ed. 650	4
Duncan Townsite Co. v. Lane, 245 U. S. 308, 62 L. ed. 309	3
Miguel v. McCarl, 291 U. S. 442, 78 L. ed. 901	3
United States, Ex Parte, 242 U. S. 27, 61 L. ed. 129	3
United States, Ex Parte, 287 U. S. 241, 77 L. ed. 283	3
United States v. Dern, 289 U. S. 352, 77 L. ed. 1250	4
United States v. Irving Trust Co., 77 F. (2d) 852	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF CONTRA RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is filed for the purpose of answering the argument made by respondent on page 11 of his brief that this case should be treated in a different way from ordinary legal actions, because petitioner invoked mandamus in the Court below.

The respondent's argument, in short, is that, even if the decision below were in conflict with the decision in *United States* v. *Irving Trust Co.*, 77 F. (2d) 852 (as petitioner contends, but respondent denies), the conflict would not be sufficient ground for granting the petition herein, because this is a mandamus action wherein the trial court is given wider discretion than in ordinary actions at law; and that this court should not review the novel and important questions involved until there has been a conflict between the *Irving Trust Company* decision and a decision in an "ordinary legal action" involving the identical questions here presented.[1]

It is the petitioner's contention that the Commissioner of Internal Revenue, in refusing to credit or refund the overpayments of taxes found to be due petitioner by the decisions of the Board of Tax Appeals, disregarded clear and precise statutory provisions requiring him to take such action (see appendix to petitioner's brief, p. 23), and petitioner sought mandamus to compel compliance with the statute as the most appropriate remedy. The Court below, while conceding that the Board's finding made mandatory the duty of the Commissioner to make the refund and that mandamus was the proper remedy (R. 36), nevertheless, refused to issue the writ, on the ground that "the remedy by mandamus is controlled by equitable principles" and "to grant it here would not vindicate a right but do a wrong". (R. 40)

The respondent argues (p. 11) that it is the settled policy of this Court "not to disturb a decision (refusing a mandamus) when it represents the exercise of the sound judicial discretion of the Court below." There can be no dis-

[1] Respondent's argument at page 10 of his brief that the *Irving Trust* case is not in conflict because the two courts relied upon different theories in arriving at inconsistent results, is without substance. The conflict of decision is apparent, since the court in the *Irving* case denied the right to apply a barred overpayment against an enforceable deficiency, whereas the court below permits a barred claim for additional taxes to defeat recovery of an overpayment, refund of which is not barred. The views expressed by the respective courts in the opinions cannot obscure the patent conflict of decision.

pute as to this, but it is equally well settled that judicial discretion cannot be used as the basis for the refusal to enforce or observe a valid statute. *Ex Parte United States*, 242 U. S., 27, 42, 44, 61 L. ed. 129, 140, 141; *Ex Parte United States*, 287 U. S. 241, 250, 251, 77 L. ed., 283, 287, 288; *Miguel* v. *McCarl*, 291 U. S. 442, 78 L. ed. 901. In the last mentioned case the court below (by Groner, J., who wrote the opinion in the instant case) refused mandamus because it "should not issue in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion." See 66 F. (2d) at p. 566. This Court said, however, as to these same statutory provisions (291 U. S., p. 453), "Statutory provisions so clear and precise do not require construction. In such case, as this Court has often held, the language is conclusive. 'There can be no construction where there is nothing to construe' ", and reversed the court below.

In the instant case the court below expressly held (R. 36) that the finding of the Board of Tax Appeals made mandatory the duty of the Commissioner to make the refund; that the statute authorizing refunds did not involve the exercise of discretion; and that mandamus is an appropriate remedy, because nothing that the petitioner could obtain from a judgment in the Court of Claims or the District Court would be any more adequate or specific. This being so, it is submitted that the Commissioner's concluding argument on page 11 of his brief, that this case should be treated in a different way "from ordinary legal actions where the discretionary powers of Courts will be less emphasized", is entirely without support in reason or in precedent.

The cases cited by respondent at page 11 in support of his argument that this Court will not disturb the court below in refusing mandamus when such decision represents the exercise of sound judicial discretion are not in point. In *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 62 L. ed. 309, mandamus was sought to compel the Secretary of the

Interior to restore to the rolls a patent for land, the entry of which had been procured by fraud and perjury, and cancelled for that reason. This Court refused mandamus in that case because of the fraud, and it is conceded by respondent (R. 25) that there is no such element in the instant case.

In *Arant* v. *Lane*, 249 U. S. 367, 63 L. ed. 650, mandamus was sought by a government employee to vacate his order of dismissal and restore him to office, which was refused solely on the ground of laches because the petition was not filed until twenty months after relator's removal from office. There is no suggestion of any laches in the instant case.

In *United States* v. *Dern*, 289 U. S. 352, 77 L. ed. 1250, mandamus was invoked to compel the Secretary of War and Chief of Engineers to authorize the construction of a wharf in the Potomac River on land which the National Capital Park and Planning Commission, by proper action as authorized by Acts of Congress, had indicated its intention to appropriate for construction of a parkway. It was refused because it was not shown that petitioner was "clearly entitled" to build the wharf, and also because its construction would only increase the cost of condemning the land to the Government, without any substantial advantage to petitioner (see 289 U. S., p. 360), the circumstances thus being in no way similar to the facts in the instant case.

Respectfully submitted,

CHARLES MYERS,
H. C. KILPATRICK,
Counsel for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES EX RELATIONE GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR PETITIONER.

CHARLES MYERS,
H. CECIL KILPATRICK,
Attorneys for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	6
QUESTION PRESENTED	7
STATUTES INVOLVED	7
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I The Commissioner's duty to refund overpayments made by petitioner is mandatory	9
II The defense interposed is not available in this case because based upon claims against another taxpayer who is not a party to this suit	11
(a) Trustee and beneficiary are separate taxpayers, and the law forbids the crediting of overpayment of one against obligations of the other	11
(b) The defense is insufficient as a plea of set-off or recoupment	13
(c) The plea is insufficient as an equitable defense	14
III Even if the separate identity of trustee and beneficiary could be ignored, the defense does not meet the tests required by a plea of set-off or recoupment, and there is no equity in it	16
(a) A barred claim for taxes is a nullity, the collection of which is forbidden by law	16
(b) Such a claim furnishes no basis for a plea of set-off or recoupment	17
(c) Such a claim has no basis in equity	19

Page

IV A taxpayer's choice of method of procedure upon appeal from the Board of Tax Appeals does not give the Commissioner rights which he would not have under the alternative method of procedure 22

CONCLUSION 25

APPENDIX 27-31

AUTHORITIES.

I *Court and Board of Tax Appeals Decisions*

Abell v. Tait, 30 F. (2d) 54 12
Anderson v. United States, 15 F. Supp. 216 ..... 12, 18
Anderson v. Wilson, 289 U. S. 20 ..... 11, 12, 15
Baltzell v. Mitchell, 3 F. (2d) 428 12
Bowers v. New York & Albany Lighterage Co., 273 U. S. 346 21
Brewerton v. United States, 9 F. Supp. 503 21
Bull v. United States, 295 U. S. 247 17
Butterworth v. Commissioner, 23 B. T. A. 838, 63 F. (2d) 944 24
Commissioner v. Owens, 78 F. (2d) 768 12
Ex Parte United States, 242 U. S. 27 10
Ex Parte United States, 287 U. S. 241 10
First National Bank of Birmingham v. United States, 12 F. Supp. 301 13
Ford Motor Co. v. United States, 9 F. Supp. 590 .. 14
Goldmann Co. v. Burnet, 60 App. D. C. 265 24
Graham v. Goodcell, 282 U. S. 409 20
Hamilton Web Co. v. Page, 8 F. Supp. 626 15
Hart Glass Manufacturing Co. v. United States, 48 F. (2d) 435 15
Hartley v. Commissioner, 295 U. S. 216 11
Helvering v. Butterworth, 290 U. S. 365 ..... 9, 21, 24
Houston Street Corp. v. Commissioner, 84 F. (2d) 821 24
Hulburd v. Commissioner, 296 U. S. 300 ..... 12, 14, 15
Jackson v. Price, 74 F. (2d) 707 19
Jewett v. Martinsville Milling Co., 76 F. (2d) 153. 14
Manhattan Life Insurance Co. v. McKown, 90 F. (2d) 646 14

Page

McCarl v. Halstead, 59 App. D. C. 395 17
McGuire v. Gerstley, 26 App. D. C. 193, aff'd 204 U. S. 489 17
McKown v. Manhattan Life Insurance Co., 91 Fed. 352 14
Metcalf, Morris, 16 B. T. A. 881 22
Miguel v. McCarl, 291 U. S. 442 10
Myles Salt Co. v. Commissioner, 49 F. (2d) 232 .. 24
Old Colony Trust Co. v. Commissioner, 279 U. S. 716 23
Philadelphia Rapid Transit Co. v. United States, 10 F. Supp. 591 15
Roebling v. Commissioner, 28 B. T. A. 644, 78 F. (2d) 444 12
Russell v. United States, 278 U. S. 181 20
Sawtell v. Commissioner, 82 F. (2d) 221 11
Stephenson, Ida, 33 B. T. A. 252 15
Stone v. White, No. 202, October Term, 1935 13
The Foundation Co. v. United States, 15 F. Supp. 229 25
Title Guarantee Loan & Trust Co. v. Commissioner, 63 F. (2d) 621 21
Toxaway Mills v. United States, 61 Ct. Cls., 363, 273 U. S. 781 21
Union Trust Co. of Pittsburgh, Trustee v. United States, 373 C. C. H. 1937 Fed. Tax Serv., ¶ 9102. 13
United States v. Arnold et al., Trustees, 373 C. C. H. 1937 Fed. Tax Serv., ¶ 9092 13
United States v. John Gallagher Co., 83 F. (2d) 368 16
United States v. Hart, 12 Fed. Supp. 596 14
United States v. Irving Trust Co., 77 F. (2d) 852. 17
United States v. S. F. Scott & Sons, 69 F. (2d) 728 15
Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346 24
White v. Stone, 78 F. (2d) 136 13
Wynne v. Commissioner, 77 F. (2d) 473 ..... 12, 17, 21
Zellerbach Paper Co., 26 B. T. A. 96 24
Zellerbach Paper Co. v. Helvering, 69 F. (2d) 852, 293 U. S. 172 24

II *Statutory Provisions*	Discussed at Page	Quoted at Appendix Page
Judicial Code, Sec. 240(a) (U. S. C. A. T. 28, Sec. 347(a)	2	
Revenue Act of 1918—Section 219	11	
Revenue Act of 1921—Section 219	11	
Revenue Act of 1924:		
Section 218	11	
Section 219	3, 9, 11	27
Section 227	9	
Revenue Act of 1926:		
Section 218	11	
Section 219	11	
Section 274	3	
Section 1001	4, 10, 18, 22	28
Section 1005	4	29
Revenue Act of 1928:		
Sections 161-162	11, 14	
Section 275	16	
Section 322(d)	10	29
Section 607	16, 20	31
Section 609(a)	16, 19	31
Section 610	16, 21	30
Revised Statutes:		
Section 3220, (U. S. C. A. (1925 Ed.) T. 26, Sec. 149)	10	
III *Miscellaneous*		
I. T. 2020, Int. Rev. Cum. Bull. (1924) III-1, p. 348	12	
Int. Rev. Bull. (1929) VIII-2, p. 35	23	
37 Columbia Law Review 146	10, 14, 20	
District of Columbia Code, T. 24, Sec. 413	17	31
U. S. C. A. Title 26, Sec. 273, and "Historical Note"	25	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES EX RELATIONE GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

There was no opinion by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals (R. 33-40) is reported in 85 F. (2d) 230.

JURISDICTION.

The judgment of the Court of Appeals was entered May 18, 1936 (R. 40). The petition for a writ of certiorari was filed August 14, 1936, and granted March 15, 1937 (R. 42). The jurisdiction of this court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Tit. 28, sec. 347 (a)).

STATEMENT OF THE CASE.

Petitioner (relator below) seeks review of a decision of the United States Court of Appeals for the District of Columbia, rendered May 18, 1936 (R. 40), affirming the judgment of the Supreme Court of the District of Columbia, dismissing a petition for mandamus brought to compel the Commissioner of Internal Revenue to refund overpayments of income taxes in amounts determined by the Board of Tax Appeals. The defense interposed and sustained by the court below was a plea that it would be inequitable to compel refund of these overpayments to the petitioner because a beneficiary of the trust estate had received erroneous refunds of her income taxes for some of the years involved, as well as for other years, and had failed to pay taxes due for one of these years, the government being barred by the statute of limitations from recovering such erroneous refunds and from collecting such taxes.

The material facts are as follows:

Petitioner is trustee under the will of John A. Brown, Jr., deceased, who died July 17, 1919, a resident of Newtown Township, Pennsylvania, leaving a last will and codicil thereto, by the terms of which his residuary estate was bequeathed to petitioner, in trust, to collect the income and, after payment of certain expenses, to distribute the net, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, for life, and any excess above that amount to his children (R. 2-3, 17), if any, and if none, to certain nieces and nephews (R. 8-9, 15).

Decedent's widow duly elected to take under the will in lieu of taking the interest otherwise allowed her by the Pennsylvania law, and the property was delivered to petitioner upon the trusts named in December, 1920, since which time it has continued to act as such trustee (R. 3, 17).

During the years 1924 to 1930, inclusive, petitioner currently distributed to the widow the entire net income of the trust estate. Pursuant to the requirements of Section 219 of the Revenue Act of 1924 and corresponding provisions of the 1926 and 1928 Acts (see Appendix, p. 27), petitioner duly filed with the Collector of Internal Revenue a return of income for the trust estate for each of such years, deducting from the gross income the amounts so distributed to the widow. The widow, in turn, in her income tax returns, reported all such distributions for the years 1924 to 1927, inclusive, and paid taxes thereon. For the years 1928 to 1930, inclusive, she did not include such distributions in her taxable income, and the Commissioner did not require her to do so (R. 3, 17, 24).

On March 15, 1929, the Commissioner of Internal Revenue, pursuant to the provisions of Section 274 of the Revenue Act of 1926, notified petitioner of alleged deficiencies in income taxes of the trust estate for the years 1924 and 1925, resulting from the Commissioner's disallowance of the deduction of amounts so distributed to the widow. Petitioner, on May 11, 1929, duly filed with the United States Board of Tax Appeals an appeal from the Commissioner's determination in this regard. The Board on June 23, 1931, entered a decision sustaining the Commissioner's determination that such deductions should be denied, and computing the resulting deficiencies at $30,278.28 for 1924 and $16,580.85 for 1925. Petitioner, on December 21, 1931, filed with the United States Circuit Court of Appeals for the Third Circuit a petition for review of the Board's decision, and on April 26, 1933, the appellate court reversed the Board (R. 3-4, 18). Meanwhile, pending review, petitioner on February 10, 1932, had paid the amounts determined as

deficiencies by the Board, together with interest of $18,279.01 (R. 4, 18), in lieu of filing a bond to stay collection, under the provisions of Section 1001 of the Revenue Act of 1926 (see Appendix, p. 28).

Pursuant to the mandate of the appellate court, the Board on July 7, 1934, entered its decision, wherein it ordered and decided that there were no deficiencies due from petitioner for 1924 or 1925, but that in fact, there were overpayments for such years in the respective amounts paid on February 10, 1932 (R. 4, 18). That decision became final on August 7, 1934, under the provisions of Section 1005 of the 1926 Act (see Appendix, p. 29).

A similar deficiency notice was sent petitioner on January 22, 1931, asserting a deficiency for the year 1928. On March 6, 1931, petitioner appealed to the Board of Tax Appeals, which entered its decision, on stipulation of the parties, on September 29, 1934, determining that petitioner had overpaid its taxes for that year in the amount of $4,376.29. No petition for review of that decision was filed (R. 4, 5, 18-19), and it became final on December 29, 1934, under section 1005, *supra* (see Appendix, p. 29).

There are no income, war-profits, or excess-profits taxes, or instalments thereof, due from petitioner, as such trustee, for any year or period (R. 5, 19, 23-25), against which respondent could credit these overpayments. Nevertheless, respondent refused to refund the overpayments in question. Petitioner's petition for mandamus seeks to compel him to do so. In answer to the petition, respondent denied the Court's jurisdiction (R. 21-22), and defended his failure to refund the overpayments by asserting that such refund would be contrary to equity and good conscience. This defense is based upon the following facts (R. 23-25):

The widow received income from the trust, as aforesaid, and for the years 1924 to 1927, inclusive, paid income taxes thereon. However, she later filed claims for refund of most of the taxes so paid, on the ground that, as a matter of law, this income represented the return to her of the value of

her dower and statutory rights, which she had relinquished when she elected to take under decedent's will, and therefore was not taxable income in her hands. The Commissioner of Internal Revenue considered these claims and allowed substantially, though not exactly, the amounts claimed, refunding to her on September 17, 1931, an aggregate of $60,636.12 as taxes paid on such income for the years 1924 to 1927, inclusive, together with statutory interest thereon. Of this amount, the refund of tax for 1924 was $24,807.99 and for 1925 $11,903.18.

During 1928, the widow received income from the trust, but in good faith did not treat it as taxable in her return. If it had been included, the tax thereon would have been $4,376.39. The Commissioner and his agents examined this return and, with full knowledge of the facts, accepted it as correct (R. 24).

Respondent avers that the Commissioner's action in refunding taxes to the widow for the years 1924 to 1927, inclusive, and in approving her 1928 return, resulted from an error of law on his part, honestly concurred in by the widow; that she has been unjustly enriched by reason of these circumstances; that she and the petitioner "are the same parties in interest"; that the relief herein prayed, if granted, would inure to her sole benefit; and that, in equity and good conscience, respondent should not be directed to refund to petitioner any amount in excess of the amounts now alleged to be justly due and owing from the widow (R. 25).

A demurrer to the answer (R. 26-29) was overruled by the trial court and, the petitioner electing to stand thereon, the petition was dismissed (R. 29). On appeal, the Court of Appeals, while overruling respondent's objections to the jurisdiction (R. 35-37), sustained the validity of the last-mentioned plea and affirmed the order of dismissal (R. 40-41).

SPECIFICATION OF ERRORS.

(1) The Court of Appeals erred in holding that a trustee is not entitled to a writ of mandamus commanding the Commissioner of Internal Revenue to refund overpayments of income tax found to be due it by final decisions of the Board of Tax Appeals, if it appears that a beneficiary of the trust, with the acquiescence of the United States, in good faith, and without intent to defraud, obtained erroneous refunds of income tax for some years and failed to pay income tax for other years, which in the aggregate exceed the amount of the overpayments due the trustee and which are barred from recovery from the beneficiary by the applicable statutes of limitations.

(2) The Court of Appeals erred in holding that a claim of the United States to recover erroneously refunded income tax, which is barred from collection by the statute of limitations, may be set off against a valid claim for refund of income tax for a different taxable year.

(3) The Court of Appeals erred in holding that a court may disregard statutory limitations on the assessment and collection of taxes and recovery of erroneous refunds of taxes, because it believes that the observance of such limitations would be inequitable, there being no charge of fraud or bad faith on the part of the taxpayer.

(4) The Court of Appeals erred in holding that, where a taxpayer, in lieu of filing bond, pays a deficiency determined by the Board of Tax Appeals pending review of the Board's decision by a circuit court of appeals, and where the court disallows the deficiency so determined by the Board, the Commissioner may not be required to refund such payment to the taxpayer.

(5) The Court of Appeals erred in holding that after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner may, in a proceeding

against him to require refund of such overpayments, defeat such refund on grounds not asserted before the Board.

(6) The Court of Appeals erred in holding that a valid claim for refund of overpayments of income taxes by a trustee, in its fiduciary capacity, may be set off or credited against a claim of the government against a beneficiary of the trust.

(7) The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia.

QUESTION PRESENTED.

Whether the refusal by the Commissioner of Internal Revenue to refund to a trustee admitted overpayments of income tax is justified by a showing that the government once had claims for erroneous refunds and for taxes against a beneficiary of the trust, which claims the government is precluded from collecting under the applicable statutes of limitation.

STATUTES INVOLVED.

The statutes involved, and the proposition for which each is cited, appear in the Appendix, *infra*, pp. 27-31.

SUMMARY OF ARGUMENT.

1.

Where the Board of Tax Appeals sustains a deficiency in income taxes determined by the Commissioner and the taxpayer, in appealing to a Circuit Court of Appeals pays the deficiency instead of posting a bond, the deficiency so paid must be credited or refunded, upon reversal by the court of the Board's decision. Likewise, where the Board of Tax Appeals, by final decision, determines that the taxpayer has made an overpayment of income taxes, the amount of such overpayment must be credited or refunded if not barred by the statute of limitations. If no other income taxes are due

from the taxpayer, the overpayment, in each instance, must be refunded. The duty of the Commissioner of Internal Revenue to make such refund is mandatory, and should be compelled by mandamus, unless the government has a valid claim against the taxpayer which may be set off against such refund.

2.

The defense interposed may not be sustained, because founded upon alleged claims of the government against a separate taxpayer, not a party to this suit. For tax purposes, the federal statutes deal with trustee and beneficiary as separate entities, and an overpayment by one may not be credited or offset against a deficiency due from the other, nor made the excuse for refusing refund of such overpayment under the guise of set-off, recoupment or equitable defense.

3.

Even if the taxing statutes did permit the separate identity of trustee and beneficiary to be ignored, the respondent's defense would be invalid under other statutory provisions which prohibit the collection, either directly or indirectly, of claims for taxes or erroneous refunds after the expiration of specified periods of limitation. Congress also has decreed that collections made in violation of such prohibition must be refunded without regard to any supposed "equities" arising from the fact that the tax was at one time due. Respondent thus asks the court to sanction the indirect collection of stale claims which, if collected directly, he would be required to refund. This plea does not meet the tests required of a plea of set-off or recoupment, and is invalid as an equitable defense. A court may not disregard statutory limitations simply because it appears to the court that the observance of such limitations would produce inequitable results.

4.

Under the procedure prescribed for review of decisions of the Board of Tax Appeals, the taxpayer who loses his case in the Board is given the choice of staying collection pending review by the filing of a bond, or paying the money pending the court's decision. If he adopts the first procedure, a reversal by the court satisfies the condition of the bond. If he adopts the second method, the statute requires refund of his money without the filing of claim. The decision below holds that selection of the second method gives the Commissioner a right, which he could not possibly possess if the first method were adopted, to convert the money to a use not contemplated by the parties nor mentioned in the statute. The adoption of such a rule gives the Commissioner power to make illegal assessments at will whenever he deems it advisable to effect such an oblique collection of a barred tax.

ARGUMENT.

I.

The Commissioner's Duty to Refund the Overpayments Made by Petitioner is Mandatory.

As has been stated, all of the income of this trust has been currently distributed by petitioner, as trustee, to Mrs. Brown. Pursuant to the provisions of sections 219 and 227 of the Revenue Act of 1924, and corresponding provisions of the 1926 and 1928 Acts, petitioner has duly filed returns each year, reporting the gross income and deductions of the trust, the latter including amounts distributable to the beneficiary. Such distributable amounts are deductible by the trustee, *Helvering* v. *Butterworth*, 290 U. S. 365.

However, for the years 1924, 1925 and 1928, the Commissioner denied petitioner's right to deduct these amounts and proposed to assess the trustee with income taxes on the resulting net income. Pursuant to statute, petitioner appealed to the Board of Tax Appeals from this determina-

tion by the Commissioner. In the 1924-1925 appeal, the Board sustained the Commissioner, (23 B. T. A. 1451) and petitioner appealed to the Circuit Court of Appeals for the Third Circuit, which reversed the Board and disallowed the deficiencies found by the Board (R. 3, 4, 18).

Meanwhile, pending the determination of its appeal to the court, petitioner paid the deficiencies (with statutory interest), in lieu of filing bond. Under the plain provisions of section 1001(d) of the Revenue Act of 1926 (Appendix, p. 29), it became the duty of the Commissioner of Internal Revenue (see Sec. 3220, R. S.; Title 26, U. S. C. A. (1925 Ed.), Sec. 149) immediately after the court's decision, to credit the amounts so paid against any income taxes then due from petitioner and to refund the balance. Although admitting that there were no such taxes then due from petitioner (R. 5, 19, 23-25), the respondent refuses to refund.

In the 1928 case, the Board of Tax Appeals determined that petitioner had made an overpayment of $4,376.39, and that such overpayment had been made within two years before the petition was filed. Under the provisions of section 322(d) of the Revenue Act of 1928 (Appendix, p. 30), the respondent was then required to credit or refund such overpayment to the petitioner, but he refuses to do so.

The only excuse offered by respondent for his refusal to make these refunds, is that it would be inequitable to refund moneys which would inure to the sole benefit of the widow beneficiary of this trust, against whom he has certain unenforceable claims. Unless that excuse be a valid defense, petitioner is entitled to the relief prayed for, as the court below so clearly demonstrated (R. 35-37).[1]

---

[1] The court below expressly held (R. 36) that the finding of the Board of Tax Appeals made mandatory the duty of the Commissioner to make the refund; that the statute authorizing refunds did not involve the exercise of discretion and that mandamus is an appropriate remedy, because nothing that the petitioner could obtain from a judgment in the Court of Claims or the District Court would be any more adequate or specific. The Court nevertheless denied the writ because "the writ of mandamus is not a writ of right, but is awarded only in the exercise of a sound judicial discretion and to compel the perform-

II.

The Defense is Not Available in This Case Because it is Based Upon Claims Against Another Taxpayer, Who is Not a Party to This Suit.

(a) Trustee and beneficiary are separate taxpayers, and the law forbids the crediting of overpayments of one against obligations of the other.

Under section 219 of the Revenue Act of 1924 (Appendix, p. 27) identical in substance with corresponding provisions of all Revenue Acts since 1918,[2] the same tax rates are imposed upon the income of estates or trusts as upon the income of individuals. The trustee pays the tax, but in computing the taxable net income of the trust, he deducts the amount of trust income which is to be distributed currently under the terms of the trust instrument, and such amount (like partnership income)[3] must be included by the beneficiary in his return, whether actually distributed or not. The statutes define a "taxpayer" as "any person subject to" the income tax, and define "person" as "an individual, a trust, or estate, a partnership, or a corporation." (Appendix, p. 28)

There can be no doubt, then, that a trust and its beneficiary each is a "taxpayer", making his own return and claiming and receiving his own appropriate deductions. *Anderson* v. *Wilson*, 289 U. S. 20; *Hartley* v. *Commissioner*, 295 U. S. 216. See also, *Sawtell* v. *Commissioner*, 82 F. (2d) 221, 222 (C. C. A. 1st) where the court said:

> "The basic plan of the statute is that income of property held in trust shall be taxed to the fiduciary. The

---

ance of an act which in equity and good conscience ought to be performed", (R. 37).

However, it is well settled that judicial discretion cannot be used as the basis for the refusal to enforce or observe a valid statute. *Ex Parte United States*, 242 U. S. 27, 42, 44; *Ex Parte United States*, 287 U. S. 241, 250, 251; *Miguel* v. *McCarl*, 291 U. S. 442. See also comment on the decision below appearing in 37 Columbia Law Rev., pp. 146-8.

[2] Section 219 of the 1918, 1921 and 1926 Acts, and Sections 161-162 of the 1928 and subsequent acts.

[3] See, for example, Sec. 218 of the Revenue Acts of 1924 and 1926.

> fiduciary is regarded for purposes of taxation as the legal owner of the property and of the income."

In *Anderson* v. *United States*, 15 F. Supp. 216, 223 (Ct. Cl.), the Court of Claims said:

> "Under the federal taxing acts an estate is a distinct taxable entity and is placed in the same class as other taxpayers • • •."

To the same effect are *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C. C. A. 1st) cert. den. 268 U. S. 690 and *Abell* v. *Tait*, 30 F. (2d) 54 (C. C. A. 4th), cert. den. 279 U. S. 849.

The earliest administrative ruling on the subject of forbidding the crediting of overpayments of one taxpayer against the liability of another, under such circumstances, appears to be *I. T. 2020*, reported in *Internal Revenue Cumulative Bulletin III-1* (1924), at page 348. There the executor of an estate was also the sole beneficiary. For the year 1918, he overpaid his individual income tax, and, when an additional tax was assessed against the estate for the same year, the question arose as to whether the overpayment could be credited against the deficiency due from the estate. In the ruling cited, it was held that such a credit would be invalid, because an overpayment may be credited only to the taxpayer making the payment and that the individual, though sole beneficiary of the estate, was not the same taxpayer as the executor. The soundness of this rule has been recognized, not only by the repeated re-enactment of the statute, but by the overwhelming weight of authority:

> *Roebling* v. *Commissioner*, 28 B. T. A. 644, 656, rev'd on other grounds, 78 F. (2d) 444 (C. C. A. 3rd).
> *Anderson* v. *Wilson*, 289 U. S. 20, 27.
> *Hulburd* v. *Commissioner*, 296 U. S. 300.
> *Wynne* v. *Commissioner*, 77 F. (2d) 473 (C. C. A. 5th).
> *Commissioner* v. *Owens*, 78 F. (2d) 768, 776 (C. C. A. 10th).

[redacted] v. Commissioner (C.C.A. 9th, April 12, 1937) C.C.H. Fed. Tax Serv., par. 9045.

(b) The defense is insufficient as a plea of set-off or recoupment.

The Court of Appeals conceded that there was no basis for a set-off and refrained from discussion of the sufficiency of the defense as a plea of recoupment (R. 37). However, the designation of the same kind of defense in other cases as a plea of set-off or recoupment makes it desirable to discuss those questions.

The same kind of defense was sustained in *White* v. *Stone*, 78 F. (2d) 136 (C. C. A. 1st)[4] and in *First National Bank of Birmingham* v. *United States*, 12 F. Supp. 301 (D. C., N. D. Ala.)[5], but was overruled in *United States* v. *Arnold, et al., Trustees* (decided by U. S. Circuit Court of Appeals for the Third Circuit February 4, 1937) 373 C. C. H. 1937 Fed. Tax Serv. ¶ 9092, and in *Union Trust Company of Pittsburgh, Trustee*, v. *United States* (D. C., W. D. Pa., Feb. 9, 1937), 373 C. C. H. 1937 Fed. Tax Serv. ¶ 9102.

In the *White* case, the defense was sustained as a plea of set-off under what the court believed to be general principles of the law of contracts and under a Massachusetts statute. In the *First National Bank* case, a similar defense was sustained on the broad ground that, although trust and beneficiary are treated as separate taxable entities by the tax laws, equity requires that an amount paid by a trustee in discharge of a tax improperly imposed upon the trust, be "treated and retained" by the government "as in part discharge" of a barred tax liability of the beneficiary.

In the *Arnold* case, the same sort of defense was considered as a plea of estoppel and overruled, the court saying that the neglect or refusal of the taxing authorities to assess the beneficiary "would not make the estate or any one else taxable who otherwise would not be." In the *Union Trust Company* case, the same defense was denom-

[4] Pending in this court as *Stone* v. *White*, No. 202, October Term, 1935.

[5] Pending on appeal, United States Circuit Court of Appeals, Fifth Circuit.

inated a "recoupment defense" and overruled on the authority of the decision in the *Arnold* case.

To sustain a plea of set-off or recoupment, the claims of plaintiff and defendant must be mutual and subsisting between the same parties, acting in the same capacity or right. *Manhattan Life Insurance Co.* v. *McKown*, 90 Fed. 646 (C. C. A. 3rd)—same case below, 91 Fed. 352 (C. C., W. D. Pa.); *Jewett* v. *Martinsville Milling Co.*, 76 F. (2d) 153 (C. C. A. 7th).

Obviously, if the separate identity of trust and beneficiary is to be respected, the adverse claims in this case are not mutual. Neither the respondent nor his principal has ever had a claim against this petitioner for either the 1928 taxes of the beneficiary or the erroneous refunds made to her for other years. As to the 1928 taxes section 162 (c) of the Revenue Act of 1928 (Appendix, p. 27) makes the beneficiary alone liable. An assessment against the trustee is not an assessment against the beneficiary either in substance or in form, 37 *Col. Law Rev.*, p. 148. Cf. *Hulburd* v. *Commissioner*, 296 U. S. 300. As to the obligation to return erroneous refunds, that is quasi-contractual and enforceable only against the person to whom the refunds were made. *United States* v. *Hart*, 12 F. Supp. 596. (D. C., E. D. Pa.)

(c) The plea is insufficient as an equitable defense.

The only basis suggested for taking this case out of the rule that a set-off or recoupment may not be based upon a claim against one who is not a party to the action, is the allegation that the trustee and beneficiary herein "are the same parties in interest" and that "any relief prayed herein and granted will inure to the sole benefit of" the beneficiary, Mrs. Brown (R. 25). But an attempted set-off of this kind has been held invalid in the case of parent and subsidiary corporations (*Ford Motor Company* v. *United States*, 9 F. Supp. 590, 601, 602) (Ct. Cl.); cert. den-

296 U. S. 636); of two corporations with common stock ownership (*Hart Glass Manufacturing Co.* v. *United States*, 48 F. (2d) 435, 442) (Ct. Cl.); cert. den. 286 U. S. 536); of a corporation and its sole individual stockholder (*United States* v. *S. F. Scott & Sons*, 69 F. (2d) 728) (C. C. A. 1st); of taxpayer and transferee (*Hamilton Web Co.* v. *Page*, 8 F. Supp. 626, 633) (D. C., R. I.); of lessor and lessee where the lessee was obligated by contract to pay the lessor's taxes (*Philadelphia Rapid Transit Co.* v. *United States*, 10 F. Supp. 591, (Ct. Cl.) cert. den. March 2, 1937); and of an executor in his capacity as such, on the one hand, and as residuary legatee on the other (*Hulburd* v. *Commissioner*, 296 U. S. 300; *Ida Stephenson*, 33 B. T. A. 249). Yet, in each of these cases the result was no less "inequitable" than would be the refunds here demanded, in that the result inured to the benefit of the real party in interest, against whom the government had other claims. In *Anderson* v. *Wilson, supra*, in holding that the income beneficiary of a trust could not deduct, for tax purposes, a loss incurred by the trust on the sale of assets, this court held that equitable considerations do not justify a departure from the rule (289 U. S. 27):

> "• • • In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. • • • We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it."

III.

Even if the Separate Identity of Trustee and Beneficiary Could Be Ignored, the Defense Does Not Meet the Tests Required of a Plea of Set-off or Recoupment, and There is No Equity in it.

(a) A barred claim for taxes is a nullity, the collection of which is forbidden by law.

It is not disputed that the time within which the United States could have proceeded against the widow under section 610 of the Revenue Act of 1928 (Appendix, p. 30) for the recovery of the erroneous refunds made to her for the years 1924 to 1927, inclusive, expired on September 17, 1933.[6] Nor is it disputed that, under section 275 of the same Act, any assessment for 1928 was barred about March 15, 1931.[7]

Had the Commissioner disregarded these limitations and proceeded thereafter to assess and collect his claims against the beneficiary, such payments by her would have been *overpayments*, refundable to her upon the filing of claim (sec. 607, Revenue Act of 1928, Appendix, p. 31), and such refund could not have been resisted on any plea of equity arising from the mere fact that the taxes should have been paid originally. Furthermore, if after such limitation expired, he had credited overpayments due her (or overpayments due the trustee) against such claims for additional taxes, the credit would be *void*, by express statutory provision (sec. 609(a), Revenue Act of 1928, Appendix, p. 31), and the taxpayer could recover the amount of the barred taxes collected by means of the credit, regardless of the original liability to pay the barred taxes. *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th).

---

[6] i. e., two years after such refunds were made.

[7] Return was due and presumably filed on or before March 15, 1929.

Thus after March 15, 1931, under plain statutory provisions, the Commissioner could not have exacted payment of any 1928 taxes from the beneficiary, either directly by collection, or indirectly by application of a credit of overpayments to her. And, after September 17, 1933, he was likewise prohibited from collecting any such claim for 1924 or 1925. In short, the beneficiary's liability was extinguished long before this suit was filed, and respondent has no valid claims against the beneficiary.

(b) Such a claim furnishes no basis for a plea of set-off or recoupment.

If the respondent has no claim enforceable directly or indirectly against the beneficiary, how may the plea here be sustained? Certainly not as a plea of set-off or recoupment. One against whom a set-off is claimed must be under a legal obligation to pay the amount of the set-off to the claimant or the set-off may not be allowed. *United States* v. *Irving Trust Co.*; 77 F. (2d) 852 (C. C. A. 2nd); *McGuire* v. *Gerstley*, 26 App. D. C. 193, aff'd 204 U. S. 489. If the claim is barred at the time the set-off is claimed, it may not be allowed. *McCarl* v. *Halstead*, 59 App. D. C. 395; D. C. Code, Title 24, sec. 413 (Appendix, p. 31).

Viewed as a plea of recoupment, the defense is not good, even if the separate identity of trust and beneficiary could be overlooked. There is no mutuality, in that the trustee could not "recoup" overpayments due the beneficiary against a demand for additional taxes from the trust. *Wynne* v. *Commissioner*, 77 F. (2d) 473 (C. C. A. 5th).

Another essential feature of a recoupment is that the claim must arise out of some feature of the transaction upon which petitioner's claim is founded. *Bull* v. *United States*, 295 U. S. 247, 262. The transaction which gave rise to petitioner's claims for 1924 and 1925 was the deposit of amounts, pending court review, which were demanded by respondent as taxes due from the trust. That demand

having been held illegal, section 1001(d) requires the return of the money. Likewise, the transaction which gave rise to petitioner's claim for 1928 was the payment by it of taxes in excess of those properly due by the trust. The respondent's claims for 1924-1927 arise out of erroneous refunds of money by him to the beneficiary, and his claim for 1928 arises from underpayment of taxes by the beneficiary for that year.

In the courts below it was argued that the "same transaction" which permits a plea of recoupment is the "taxation of the income of a testamentary trust distributed to the beneficiary." If this be a sound theory, it follows that an overpayment by the trustee for 1925 may be applied against a tax due from the beneficiary for 1927 or against any claim for a refund made to her under a mistake of law. By the same token, an overpayment by the beneficiary for 1930 may be defeated by a claimed deficiency of the beneficiary for the year 1920, without regard to statutory limitations, solely on the ground that the beneficiary received trust income in each of such years.* This contention overlooks the fact that the distributable trust income of the beneficiary is only one element in the computation of her taxable income. Income from other sources may greatly increase her tax, or statutory deductions having no relation to trust matters may reduce or entirely wipe out her taxable income. On the other hand, capital gains or losses of the trustee, seriously affecting its taxable income, have no effect whatever on her tax liability. *Anderson* v. *Wilson*, 289 U. S. 20. The trust estate's operation may show a deficit, but the beneficiary nevertheless is taxable on

---

* Respondent has never contended that the doctrine of recoupment applies to the claims against the widow for 1926 and 1927, which aggregate $29,124.40 (R. 24), and which have no relation whatever to petitioner's demands which are for 1924, 1925 and 1928. Nevertheless, respondent does not limit his claims against the beneficiary to the same taxable years for which petitioner is entitled to refunds, and if his defense is sustained as a recoupment plea, it is necessary to find that the beneficiary's income for any given year grows out of the same transaction as her income (or the trustee's) not only for that year but for all years.

amounts distributed to him. *Jackson* v. *Price*, 74 F. (2d) 707 (C. C. A. 2nd).

Respondent's contention in this respect would make the statutory limitation on assessment and collection inoperative in the case of any taxpayer who receives income, year after year, from the same source, and section 609(a), *supra*, would be nullified.

We submit, therefore, that respondent's plea may not be sustained under any theory of set-off or recoupment.

(c) Such a claim has no basis in equity.

The Court of Appeals in the instant case, as we have said, agreed that there was no right of credit or set-off and did not base its decision on the theory of recoupment. The Court held that respondent neverthless could refuse to refund overpayments illegally exacted from the trustee, simply because he once had claims against the beneficiary which were not paid. In reaching this conclusion, the Court of Appeals used the following reasoning (R. 35):

> "Mrs. Brown owes the United States a large amount of money for taxes. The statute of limitations has intervened, and the government cannot collect. On the other hand, her trustee, Girard, has paid to the United States a large amount of money for taxes for which it is not liable and which the Board has determined it is entitled to recover. The money, however, which it mistakenly paid belonged to Mrs. Brown and, if recovered, will be payable to her; so that if we shall order the lower court to issue the writ, the result will be to require the United States to pay over money which—while technically that of Girard—actually would go to Mrs. Brown. Obviously, this is inequitable and ought not to be done unless required as a matter of law."

The decision that the Commissioner, although denied the right to credit an overpayment against a barred deficiency claim, may nevertheless defeat recovery of the overpay-

ment upon a mere showing that such a deficiency claim once existed, is untenable. Cf. *Graham* v. *Goodcell*, 282 U. S. 409, 423. To transfer funds illegally collected from the trustee to the account of the beneficiary, merely because they would be payable to the latter if refunded, is a distraint quite as well as would be a direct seizure of funds already in the latter's possession. *37 Col. Law. Rev. 148.*

The decision below rests squarely upon the proposition that an equity arose in favor of the government from the lack of diligence of its own officials, and sprang into being at the moment that this official inaction destroyed the liability in question. That is necessarily so, because the alleged equity rests upon the ground that collection from the beneficiary is barred, and there could be no such defense if it were not so barred. As to 1928, the respondent's defense, sustained below, presents this absurd situation: If the widow had paid the tax after limitation on assessment had expired, there would be no basis for respondent's plea, and he would be required to pay petitioner its demands. But, under section 607 of the 1928 Act, *supra*, the widow could then recover her payment on the ground that it was collected too late, and the result would be exactly the same as that which the court below denounced as inequitable. The result in each case flows from statutory provisions that official inaction over a stated period of time shall wipe out all liability for the tax. *Russell* v. *United States*, 278 U. S. 181, 187.

The real basis of the decision below, therefore, is that the operation of the statute of limitations produces inequitable results and that the statute may, for this reason alone, be ignored. The theory is that, at the moment the bar falls, and *because* it falls, an "equity" springs full-blown into being, which justifies the party so barred in effecting the collection of his defunct claim by an indirect method not theretofore available to him. If this view be sound, it was inequitable for this court to order refund, in *Bowers* v. *New*

York & Albany Lighterage Co., 273 U. S. 346, of taxes collected after the bar of the statute had fallen; and the result was inequitable when this court, on confession of error by the Solicitor General of the United States, reversed the decision of the Court of Claims (61 Ct. Cls. 363) in *Toxaway Mills* v. *United States*, 273 U. S. 781, where that court had expressed the view that the taxpayer could not recover such a collection unless it could show that "the government *ex aequo et bono* is bound to refund." (61 Ct. Cls. 373) See also *Brewerton* v. *United States*, 9 F. Supp. 503. (Ct. Cls.)

It was argued below that the equities favoring respondent were strengthened by the alleged fact that he did not know until this Court's decision in *Helvering* v. *Butterworth, et al.*, 290 U. S. 365, that he had a claim against the widow and that it was then too late to proceed against her. However, as the court below points out (R. 38), one United States Circuit Court of Appeals[9], within time for respondent to proceed under section 610 of the Revenue Act of 1928 against the beneficiary in the instant case, had held a widow subject to such tax in an identical case. Respondent was a party to that suit and therefore had ample notice of his rights. However, we submit that neither respondent's ignorance of the law nor his laches should create any equity in his behalf, and that a court may not disregard statutory limitations, as did the court below, simply because it feels that the observance of such limitations would produce inequitable results.

The rule for which respondent contends could never be invoked by a taxpayer possessed of the same "equities". He cannot enjoin the collection of an admitted tax liability upon a showing that he has a barred claim for refund. A trustee cannot resist a deficiency because of overpayments due the beneficiary of the trust, whether barred from refund or not. *Wynne* v. *Commissioner*, *supra*.

---

[9] *Title Guarantee Loan & Trust Co.* v. *Commissioner*, 63 F. (2d) 621 (C. C. A. 5th), decided February 17, 1933.

The defense interposed rests upon the ground that the statute of limitations, designed to put an end to disputes, may be ignored wherever the barred claim was originally a valid one, leaving the statute to be enforced only where the alleged debtor is able to show that there was no debt and where, therefore, he is not in need of the protection of the statute.

IV.

A Taxpayer's Choice of Method of Procedure Upon Appeal from the Board of Tax Appeals Does Not Give the Commissioner Rights Which He Would Not Have Under the Alternative Method of Procedure.

Section 1001, Revenue Act of 1926, as amended (Appendix, p. 28) prescribes the method for judicial review of decisions of the Board of Tax Appeals. The taxpayer may file a surety bond and stay collection, or he may pay the deficiency pending review. If he adopts the latter course, either voluntarily or because he cannot secure an acceptable bond, and if the court disallows the deficiency determined by the Board, his payment is to be returned to him by credit or refund "without the making of claim therefor". The intention of Congress seems clear. Such a payment pending review is to be treated, as the court below said (R. 34-35), as a deposit in lieu of bond. If such deposit were entrusted to the clerk of the court, it can hardly be denied that, the taxpayer having won its case, the court would order the deposit returned. But the Court of Appeals holds that, because the custodian of the fund was also the officer charged with collecting taxes, he may retain the deposit and apply it against other claims, the collection of which has long since been outlawed. A parallel situation was presented in the case of *Morris Metcalf*, 16 B. T. A. 881, where a taxpayer offered to compromise a proposed deficiency and deposited $500 with the Commissioner for that purpose. The offer was rejected, but the Commissioner, after the statutory period for assessment

of the deficiency had expired, applied the deposit against the claimed deficiency. The Board held that this application of the money constituted a collection of a barred deficiency and therefore represented an overpayment of $500.[10]

The decision below recognizes (R. 37) that the erroneous refund to the widow could not have been set up as a defense in the Board proceeding. If, therefore, petitioner, instead of paying, had posted the bond permitted by section 1001 (c), "conditioned upon the payment of the deficiency as finally determined", the bond would have been satisfied by the decision of the Court of Appeals that no deficiency was due. The Commissioner then would have had no method of collecting his claims against the widow, who would have been "unjustly enriched" to the same extent as that here urged. The decision below therefore is clearly that petitioner's selection of one of the two alternatives offered by section 1001 gives the Commissioner a right, which he could not possibly possess if the first method were adopted, to convert the money to a use not contemplated by the parties nor mentioned in the statute.

If payment of a deficiency pending review is to lift the bar of the statute of limitations and place upon the taxpayer the burden of defending not only the immediate threatened imposition, but any and all barred claims for any year in the remote past that government officials might choose to assert, then the choice of procedure offered for the relief of taxpayers by section 1001 becomes a trap for the unwary. Such a doctrine makes a mockery of a judicial proceeding designed "to provide a final adjudication in such proceedings, binding all the parties." *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716, 727. The Board was created for the purpose of providing "a more convenient, more equitable, and more speedy remedy to a person against whom a tax is improperly assessed, and the

[10] This decision was rendered June 4, 1929, and the Commissioner has formally announced his acquiescence therein. *Int. Rev. Cumulative Bulletin VIII-2*, p. 35. (1929)

provision is to be liberally construed." *Houston Street Corporation* v. *Commissioner*, 84 F. (2d) 821, 822 (C. C. A. 5th).

The Board proceeding in the 1924-1925 case was a companion case (R. 34, footnote) to *Butterworth* v. *Commissioner*, 23 B. T. A. 838, 63 F. (2d) 944. (C. C. A. 3rd), 290 U. S. 365. Had the trustee in that case paid the tax instead of posting a bond on appeal from the Board, respondent could have refused to refund, and the prosecution of that appeal before the Circuit Court of Appeals and on certiorari in this Court would have been idle, under such a theory.

In the case of *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, the sole question presented was whether the statute of limitations barred assessment and collection of a deficiency proposed by the Commissioner. The Board of Tax Appeals (26 B. T. A. 96) held that it was not barred, and the taxpayer petitioned for review by the Circuit Court of Appeals for the Ninth Circuit which affirmed the Board's decision (69 F. (2d) 852). This Court reversed. If the taxpayer in that case had paid the tax pending review, the Commissioner, on the theory sustained by the court below in the instant case, could have refused to refund the amount so paid. The result in such event would be that, in an appeal taken for the sole purpose of determining the question of limitations, the court's decision that limitation had run could be set at naught by the Commissioner's opinion that it would be inequitable to honor that decision. The same absurd situation could have resulted in *Myles Salt Company* v. *Commissioner*, 49 F. (2d) 232, (C. C. A. 5th); *Goldmann Company* v. *Burnet*, 60 App. D. C. 265, 51 F. (2d) 427, and *Valentine-Clark Company* v. *Commissioner*, 52 F. (2d) 346, (C. C. A. 8th), where the respective courts of appeal reversed the Board on a similar question.

A procedure analogous to that prescribed by section 1001 is found in the statutory provisions relating to jeopardy

assessments.[11] Where such an assessment is made, and the taxpayer appeals to the Board of Tax Appeals, but is unable to stay collection by filing a satisfactory bond, if the Board thereafter determines the assessment to have been erroneous, the amount paid must be credited or refunded "without the filing of claim therefor." In such a situation, the Commissioner should have equally as great a right to refuse the refund because of a barred claim as in the instant case. If he has such a right, then the statute of limitations is indeed meaningless, because his determination of the need for a jeopardy assessment is not subject to judicial review (*The Foundation Company* v. *United States,* 15 Fed. Supp. 229 (Ct. Cl.)) and with this potent weapon he could make illegal collections at will.

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

CHARLES MYERS,
H. CECIL KILPATRICK,
Attorneys for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

---

[11] Title 26, U. S. C. A., Sec. 273 and "Historical Note".

APPENDIX.

Pertinent Statutory Provisions and Propositions for Which Cited.

(Italics Supplied)

I.

Trustee and Beneficiary Are Separate Taxpayers.

Sec. 219, Revenue Act of 1924 (identical in substance with Sec. 219 of the 1926 Act, and Sections 161-162 of the 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 960, note:

"(a) The tax imposed by Parts I and II of this chapter (Note 1) shall apply to the income of estates or of any kind of property held in trust, including—

• • • • • • • • • •

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries • •.

"(b) Except as otherwise provided in subdivisions (g) and (h) (Note 2) *the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary.* The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 953 • • • (Note 3) except that—

• • • • • • • • • •

"(2) There shall be allowed as an *additional* deduction in computing the *net income of the estate or trust* the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries • • • but the amount so allowed as a deduction *shall be included in comput-*

Note 1: I. e., the income tax on individuals.

Note 2: These subdivisions relate to revocable trusts and trusts where income is held for or distributed to the grantor of the trust.

Note 3: Section 953 prescribes the method for computing the net income of an individual.

ing the net income of the beneficiaries whether distributed to them or not • • •"

Sec. 2(a)(1) Revenue Acts of 1924 and 1926 (identical with Sec. 701(a) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(1):

"The term 'person' means an *individual*, a *trust or estate*, a partnership, or a corporation."

Sec. 2(a)(9), Revenue Acts of 1924 and 1926 (identical with Sec. 701(a)(13) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(9):

"The term 'taxpayer' means any person subject to a tax imposed by this title."

II.

Where a Deficiency Determined by the Board is Paid Pending Court Review and the Appellate Court Disallows Such Deficiency, the Amount so Paid Must Be Credited or Refunded to the Taxpayer.

Sec. 1001, Revenue Act of 1926 as amended by Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 1224:

"(a) The decision of the Board rendered after February 26, 1926 • • • may be reviewed by a Circuit Court of Appeals • • • if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

• • • • • • • • • •

"(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review • • • is duly filed by the taxpayer, and then only if the taxpayer • • • has filed with the Board a bond • • • with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined • • •.

"(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, *the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor.* • • •"

III.

Board's Decision of Overpayment for 1924 and 1925 Became Final on August 7, 1934, and for 1928 on December 29, 1934.

Sec. 1005, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1228:

"(a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review (Note 4), if no such petition has been duly filed within such time • • •"

• • • • • • • • • •

"(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if • • • the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, • • • then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final *on the expiration of thirty days from the time such decision of the Board was rendered* • •."

IV.

Where Board Determines Overpayment, Duty to Refund is Mandatory, in the Absence of Power to Credit.

Sec. 322, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2322:

"(d) Overpayment found by Board.—If the Board finds that there is no deficiency and further finds that

---

Note 4: Three months, under sec. 1101 of 1932 Act; Title 26 U. S. C. A. (1934 Ed.) sec. 642.

the taxpayer has made an overpayment of tax in respect to the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier."

V.

The Statutory Period for Bringing Suit Against the Widow for Recovery of Refunds to Her Had Expired.

Sec. 610, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2610:

"(a) Any portion of an internal revenue tax • • • refund of which is erroneously made, within the meaning of section 2608 (Note 5) after May 29, 1927, may be recovered *by suit brought in the name of the United States*, but only if such suit is begun *within two years after the making of such refund.*

"(b) Any portion of an internal revenue tax • • • which has been erroneously refunded (if such refund would not be considered as erroneous under section 2608) may be recovered *by suit brought in the name of the United States*, but only if such suit is begun before the expiration of *two years after the making of such refund or before May 1, 1928*, whichever date is later • • •".

Note 5: Section 2608 provides that a refund made (1) after the expiration of the time for filing claim, where no claim was filed, or (2) after the expiration of the time for filing suit upon a rejected claim, where no suit was filed, shall be considered erroneous.

VI.

Where a Tax is Paid After the Period for Collection Has Expired, It Must Be Refunded.

Sec. 607, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec 2607:

> "Any tax • • • assessed or paid • • • after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and *shall be credited or refunded to the taxpayer* if claim therefor is filed within the period of limitation for filing such claim."

VII.

An Attempted Credit of an Overpayment Against a Barred Tax Liability is Void.

Sec. 609(a), Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2609(a):

> "• • • Any credit against a liability in respect of *any taxable year shall be void* if any payment in respect of such liability would be considered and overpayment under section 2607 • • •"

VIII.

A Barred Claim May Not Be Interposed by Way of Set-off in the District of Columbia.

Title 24, Section 413, Code D. C.:

> "A defendant who files a plea of set-off, founded on a claim against the plaintiff, shall be deemed to have brought an action at the time of filing such plea against the plaintiff for the matters mentioned in the plea; • • • but the same shall be open to the same defenses to which it would be open in an action brought by him thereon; • • •."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

CHARLES MYERS,
H. CECIL KILPATRICK,
Attorneys for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Foreword	1
I. There is no other remedy sufficiently plain, adequate and specific to defeat the right to mandamus	2
II. Respondent's duty to refund is purely ministerial, not discretionary	3
III. Respondent's admission that, in order to protect his so-called equity, the Court must sanction a credit which is prohibited by law, demonstrates the entire lack of equity in the defense on the merits	7
IV. Respondent admits that the theory of recoupment is of doubtful application to a substantial part of plaintiff's claims, and it is manifestly inapplicable to the 1928 claim	8
Conclusion	10

AUTHORITIES.

CASES:

Blair v. United States ex rel. Union Pacific Railroad Co., 6 Fed. (2d) 484	4, 5
Chicago Great Western R. Co. v. Interstate Commerce Commission, 294 U. S. 50	5
Houston v. Ormes, 252 U. S. 469	3
James v. United States, 38 F. (2d) 140	4
Kendall v. United States, 12 Pet. 524	5
Lane v. Hoglund, 244 U. S. 174	6
McCarl v. United States ex rel. Societa Ligure, etc., 30 F. (2d) 561	3
Miguel v. McCarl, 291 U. S. 442	3, 6
Miller v. United States ex rel. New Process Metals Co. 288 Fed. 434	3
Ohio Steel Foundry Co. v. United States, 38 F. (2d) 144	3, 4
Posados v. Manila, 274 U. S. 410	3

Page

Roberts v. United States, 176 U. S. 221 ..... 5, 6
Smith v. Jackson, 246 U. S. 388 3
Stone v. White, No. 202, October Term 1935 7
Thompson v. Perris, 116 Fed. 769 3
United States v. Black, 128 U. S. 40 3
United States v. John Gallagher Co., 83 F. (2d) 368. 8
United States ex rel. Parish v. McVeagh, 214 U. S. 124 6
United States v. Piedmont Mfg. Co. (C. C. A. 4), C. C. H. Stand. Fed. Tax Serv., par. 9220 8
Wilbur v. United States ex rel. Krushnic. 280 U. S. 306 6
Work v. United States ex rel. McAlester-Edwards Coal Co., 262 U. S. 200 6
Wright v. Ynchausti & Co., 272 U. S. 640 3

STATUTES:

Revenue Act of 1926,
Sec. 284(a) 5
Sec. 1001(d) 3

Revenue Act of 1928,
Sec. 322(a) 5
Sec. 322(d) 3
Sec. 607 ..... 5, 8
Sec. 609 7

MISCELLANEOUS:

Ferris on Extraordinary Legal Remedies 2
Opinion A. G. 8 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

FOREWORD.

Respondent's brief is principally devoted to certain procedural objections which were held invalid by the Court of Appeals and which therefore were not discussed at length in our original brief. The purpose of this brief is to answer those objections, as well as to point out certain admissions which clarify the defence and demonstrate its entire lack of merit.

I.

THERE IS NO OTHER REMEDY AVAILABLE TO PETITIONER WHICH IS SO PLAIN, ADEQUATE AND SPECIFIC AS TO DEFEAT THE RIGHT TO MANDAMUS.

Respondent argues (Br. pp. 10-13) that, because petitioner has a right to sue for refund either in the United States District Court or the Court of Claims, it is not entitled to a writ of mandamus to compel the Commissioner to refund the overpayments, as he is directed by statute to do.

It is a cardinal rule that the mere existence of another legal remedy will not defeat mandamus unless it appears, without doubt, that such remedy is plain, adequate and specific. *Ferris on Extraordinary Legal Remedies,* p. 247. As the Court of Appeals said (R. 36):

> "It [appellant] has a judgment or the equivalent of a judgment in the order of the Board of Tax Appeals—now final—and nothing it could obtain from either the Court of Claims or a District Court would be any more adequate or specific. The statute imposes on the Commissioner the duty of making payment in accordance with the final determination of the Board; and if, as we think, this duty is mandatory, the writ here prayed for is an appropriate remedy. See Houston v. Ormes, 252 U. S. 469, 472; Cole v. Helvering, 64 App. D. C. 35, 73 F. (2d) 852; McCarl v. Leland, 59 App. D. C. 362, 42 F. (2d) 346; Lucas v. Blackstone, 59 App. D. C. 389, 45 F. (2d) 291. And if it can be shown that it ought to issue, it is of no consequence that another remedy in another tribunal might produce the same result. Knox County v. Aspinwall, 24 How. 376, 385; Blair v. United States, supra."

Neither the Court of Claims nor the District Court has more power than the Board of Tax Appeals to enforce payment of a judgment against the United States. Payment of such a judgment is a ministerial duty and, if re-

fused, may be compelled by mandamus. *Houston* v. *Ormes*, 252 U. S. 469, 472-473.

This Court has passed specifically upon such an objection to a petition for mandamus and has held that the existence of a right to sue for payment of money is no defense. *Miguel* v. *McCarl*, 291 U. S. 442, 455; *Smith* v. *Jackson*, 246 U. S. 388. See also *Miller* v. *United States ex rel. New Process Metals Co.*, 288 Fed. 434, 437 (App. D. C.).

Where the enforcement of a final order, whether of a court or an administrative tribunal, devolves by statute upon an official, as a ministerial duty, mandamus is peculiarly appropriate to compel that enforcement. *United States* v. *Black*, 128 U. S. 40, 52; *Wright* v. *Ynchausti & Co.*, 272 U. S. 640; *Posados* v. *Manila*, 274 U. S. 410; *Thompson* v. *Perris* (D. C. Calif.), 116 Fed. 769; *McCarl* v. *United States ex rel. Societa Ligure, etc.* (App. D. C.), 30 F. (2d) 561; *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 148-9.

II.

THE RESPONDENT'S DUTY TO REFUND THE SUMS HERE INVOLVED IS PURELY MINISTERIAL, NOT DISCRETIONARY.

Section 1001(d) of the Revenue Act of 1926[1] requires that the deficiencies found by the Board for 1924 and 1925, subsequently paid but disallowed by the Court of Appeals for the Third Circuit, "*shall be* credited or refunded to the taxpayer without the filing of claim therefor". Section 322(d) of the 1928 Act[2] requires that the overpayment found by the Board for 1928 "*shall be* credited or refunded to the taxpayer."

We submit that these statutes clearly and unequivocally command credit or refund, and that there is no basis for the contention that they give the respondent any discretion

[1] Discussed at pages 10 and 22-25 of our original brief, and set out in full at page 29 thereof.

[2] Discussed at page 10 and set out in full at pages 29-30 of our original brief.

whatever. In the case of *Blair* v. *United States ex rel. Union Pacific Railroad Company*, 6 F. (2d) 484 (App. D. C.), the Commissioner contended that he could not be compelled by mandamus to *credit* an overpayment against an admitted tax liability for another year, because of an alleged discretion vested in him by a similar provision in the Revenue Act of 1921, but the Court rejected his contention, saying (p. 486):

> "The duty imposed upon the respondent • • • was mandatory, not discretionary; the language of the statute is 'the amount of the excess shall be credited'; the courts therefore have jurisdiction to determine the correct construction of the statute and to compel the respondent to proceed accordingly."

The Court of Claims has expressed the same view. *James* v. *United States*, 38 F. (2d) 140, 142; *Ohio Steel Foundry Co.* v. *United States*, *supra*, p. 148. The Attorney General, in an opinion dated November 5, 1934 (*Op. A. G. 8*, published in Internal Revenue Cum. Bull. XIV-1, p. 442) said, with reference to overpayments determined by final decisions of the Board of Tax Appeals, "The duty of making refunds due in those cases is mandatory."

Respondent argues, despite these authorities, that he has discretion to determine whether he shall credit or refund because he has discretion to determine whether there are outstanding taxes due for other years (or against other related taxpayers) against which to apply a credit. He admits however that the trustee owes no other taxes, and the only liability against which he asserts the right to credit is a liability already extinguished under section 607 of the 1928 Act, a liability which section 609 denies him the right to dispose of in such fashion, and a liability of a separate taxpayer which his own rulings and numerous Board and court decisions protect against such a credit even if it were not barred. Certainly, Congress never intended to give him discretion to do an illegal act. The right to credit is con-

ditioned upon there being taxes "then due from the taxpayer".[3] If such taxes are "then due"—*i.e.*, due when the time comes to dispose of the overpayment—the Commissioner is *required* to credit. *Blair* v. *United States ex rel. Union Pacific Railroad Co., supra.* If no such taxes are then due, refund is required. The act of crediting or refunding, as the case may be, on the basis of existing facts, is purely ministerial. *Roberts* v. *United States,* 176 U. S. 221, 231; *Kendall* v. *United States,* 12 Pet. 524, 613; *Blair* v. *United States, ex rel. Union Pacific R. Co., supra.*

If the barred claims asserted against the widow are not taxes "then due from the taxpayer", it inevitably follows that respondent may be required by mandamus to refund the overpayments due petitioner. Sections 607 and 609(a), *supra,* demonstrate that there are no taxes due even from the widow, and the statutory definition of the term "taxpayer" (see Appendix to our original brief, p. 28) makes it clear that Congress did not intend to give the Commissioner authority to credit the trustee's overpayment against the beneficiary's liability (see authorities collected at p. 12 of our original brief).

The cases cited by respondent at pages 16 and 17 have no bearing upon the question. In the case of *Chicago Great Western Railroad Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, the decision turned upon the question (p. 61) "whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue." The opinion re-states (p. 61) the well-established rule that "If • • • power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and hear the case on the merits."

---

[3] Section 284(a), Revenue Act of 1926; Section 322(a), Revenue Act of 1928 (Respondent's Brief, pp. 26, 28).

Here, the only question is whether respondent's refusal to refund overpayments where there are no taxes "then due" from the taxpayer making the overpayments, is a clear refusal to observe a statute requiring that such overpayments "shall be refunded." This is language of command, and brings the case within the rule announced in *Roberts* v. *United States, supra,* and followed in *Lane* v. *Hoglund*, 244 U. S. 174, *Work* v. *United States ex rel, McAlester-Edwards Coal Co.*, 262 U. S. 200, *Wilbur* v. *United States ex rel. Krushnic*, 280 U. S. 306, 318, and *Miguel* v. *McCarl, supra.* In the *Roberts* case the rule was stated as follows (p. 231):

> "Every statute to some extent requires construction of the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

To the same effect, see *United States ex rel. Parish* v. *McVeagh*, 214 U. S. 124; *Kendall* v. *United States supra.*

We submit that the statutory provisions here in question are so clear and precise that they do not require construction. "There can be no construction where there is nothing to construe." *Miguel* v. *McCarl, supra,* p. 453. Where an administrative officer interprets and applies a statute in a way contrary to its explicit terms, and in so doing departs from a plain official duty, the writ should issue to compel him to perform that duty. *Wilbur* v. *United States ex rel. Krushnic, supra.*

III.

RESPONDENT'S ADMISSION THAT, IN ORDER TO PROTECT HIS SO-CALLED EQUITY, THE COURT MUST SANCTION A CREDIT WHICH IS PROHIBITED BY LAW, DEMONSTRATES THE ENTIRE LACK OF EQUITY IN THE DEFENSE ON THE MERITS.

Respondent's brief serves to clarify one very important question involved in this case. In his answer (R. 21-22) he refused to say whether he proposed to *credit* the amounts due petitioner on the barred claims asserted against the beneficiary, and in his brief below he disavowed any such purpose. However, in his brief here (p. 15) he states that he "undertakes to credit the overpayment against taxes due by the beneficiary". It is therefore clear that, in order to protect the "equity" which he asserts, he asks the Court to sanction a violation by him of section 609(a) of the Revenue Act of 1928,[4] which provides that such a credit "shall be void". Respondent refrains from mentioning that section in his brief herein. He does make a passing reference to it in his brief in the companion case of *Stone* v. *White*, No. 202, October Term, 1935, but dismisses it with the dictum (pp. 20-21) that it does not affect his right to defend a suit for refund of an amount applied as such an illegal credit, where the barred tax was at one time due. We respectfully refer the Court to pages 16 and 20-21 of our original brief for a discussion of this untenable proposition.

Respondent's asserted right to make such a credit also conflicts with the rule, established by administrative rulings and followed for years by the Board of Tax Appeals and the courts, that an overpayment may be credited only to the particular taxpayer who made the payment. It is sig-

[4] Discussed in more detail at pages 16 and 17 of our original brief, herein.

nificant that none of these authorities[5] is mentioned by respondent.

It is apparent therefore, that respondent's plea of "equity" is simply this: That the law prohibits him from making the credit; that the operation of this law prevents him from collecting, out of funds deposited with him for another purpose, taxes which he should have collected but failed to collect within the statutory period; and that this result is so inequitable, the Court should sanction his violation of the law and sustain his decision to make the illegal credit. We submit that there is no equity in such a plea.

It is also to be observed that, unless section 607, *supra*, is to be set at naught, respondent asks the Court to permit him to do a vain thing. If, as respondent contends (Br. pp. 18-19), the money paid by petitioner in reality was a payment by Mrs. Brown, the credit which respondent seeks to make would result in overpayments by her, and she could recover the same amounts in a subsequent suit for refund. *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th).[6] If the Court sustains respondent's position here, it would simply be postponing the date on which respondent would be required to make the refunds here demanded.

IV.

RESPONDENT ADMITS THAT THE THEORY OF RECOUPMENT IS OF DOUBTFUL APPLICATION TO A SUBSTANTIAL PART OF PETITIONER'S CLAIMS FOR 1924 AND 1925, AND HIS APPLICATION OF THE THEORY TO THE 1928 CLAIM IS BASED UPON A MISCONCEPTION.

In our original brief we have attempted to show that the theory of recoupment has no application to this case because (pp. 14, 17) of lack of mutuality and because (pp. 17-18) the claims against the widow do not arise out of any transaction upon which petitioner's claims are based. The

---

[5] Discussed at page 12 of our original brief.

[6] Cf. *United States* v. *Piedmont Mfg. Co.* (C. C. A. 4), C. C. H. Stand. Fed. Tax Serv., par. 9220.

Court of Appeals did not base its decision upon the theory of recoupment,[7] but respondent now seeks to sustain that decision, in part, upon such a theory.

In his brief, respondent concedes (p. 23) that there is some doubt as to whether the widow's liability for 1926 and 1927 may be recouped against amounts due petitioner for other years, and offers no argument whatever that the 1926 and 1927 claims against her are connected with the same transactions out of which petitioner's claims arose. Obviously, no such contention can be made, and it follows that petitioner is entitled *at least* to the excess of its 1924 and 1925 overpayments above the respondent's claims for the same years. This excess amounts to $9,161.58 for 1924 and $6,876.11 for 1925.[8]

In attempting to answer our argument that the same transaction did not give rise to the claims asserted on each side, respondent contends (Br. pp. 23-24) that petitioner for 1928 paid taxes on "the same income" which the widow erroneously failed to include in her return, namely, the income properly distributable to her under the will. The record does not support this statement. Petitioner in its 1928 return deducted such distributable income (R. 3, 17). The Commissioner asserted a deficiency because he proposed to disallow that deduction. Petitioner did not pay that deficiency, but appealed to the Board, which held that there was no deficiency but an overpayment under the return (R. 4-5, 18-19). Obviously this overpayment did not represent a payment of tax on the income distributable to the widow, but a payment of tax under the trustee's return which, as stated, did not include such distributable income as taxable.

Under respondent's own theory of recoupment, therefore, petitioner is clearly entitled to at least the excessive pay-

[7] In the opinion below (R. 37), the court said: " * * * we may lay aside altogether the disputed legal right of the United States to a counterclaim or recoupment."

[8] Petitioner paid $42,732.19 for 1924, and the claim against the widow for that year is only $33,570.61; for 1925 petitioner paid $22,405.95, while the claim against the widow for that year is only $15,529.84 (R. 4, 5, 24).

ments above mentioned for 1924 and 1925 and the entire overpayment for 1928.

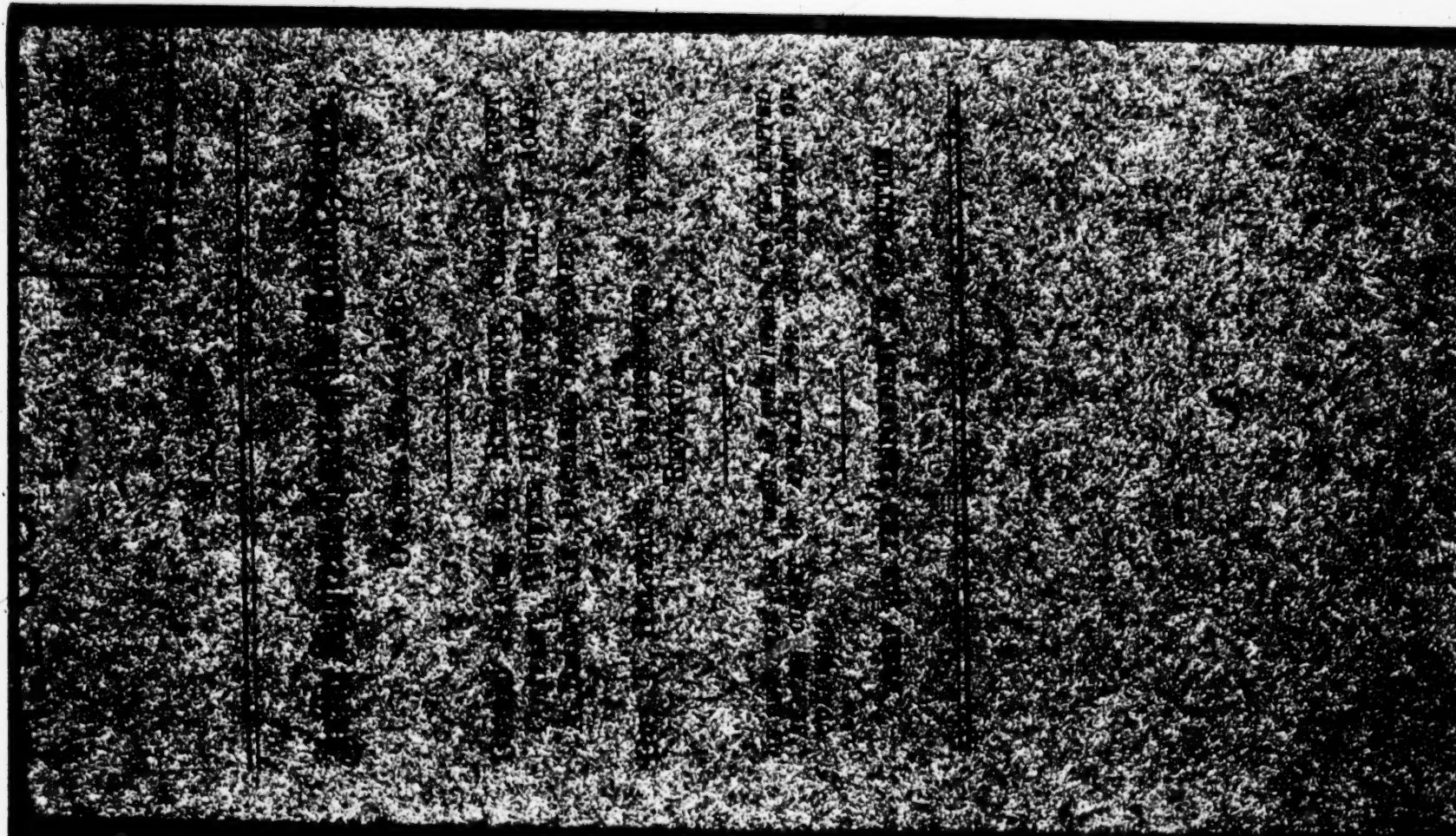
CONCLUSION.

Respondent's justification for his refusal to obey the plain provisions of a statute is that the command, if obeyed, would effect an inequitable result. He thus proposes to substitute for the rules provided his own concept of fairness. We submit that there is here no room at all for any discussion of "equities" on either side. The efficient administration of a complex taxing system has required a set of rigid rules. To permit those rules to be variously applied, depending upon an official's notions about the predominant "equities" in particular situations, would result in endless confusion. Equity will in the end be achieved by uniformity and certainty in tax administration.

Respectfully submitted,

CHARLES MYERS,
H. CECIL KILPATRICK,
Attorneys for Petitioner.

BARNES, BIDDLE & MYERS,
UNDERWOOD, MILLS & KILPATRICK,
Of Counsel.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:

Allen v. *Brandeis*, 29 F. (2d) 363	11
Arant v. *Lane*, 249 U. S. 367	11
Bull v. *United States*, 295 U. S. 247	8
Champ Spring Co. v. *United States*, 47 F. (2d) 1, certiorari denied, 283 U. S. 852	8, 10
Duncan Townsite Co. v. *Lane*, 245 U. S. 308	9, 11
First Nat. Bank of Birmingham v. *United States*, 12 F. Supp. 301	11
Helvering v. *Butterworth*, 290 U. S. 365	11
Lewis v. *Reynolds*, 284 U. S. 281	8
Myers v. *Hurley Motor Car Co.*, 273 U. S. 18	8
National Fire Ins. Co. v. *Wilson*, 8 Pet. 291	11
United States v. *Bolster*, 26 F. (2d) 760	11
United States v. *Dern*, 289 U. S. 352	9, 11
United States v. *Irving Trust Co.*, 77 F. (2d) 852	9
United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386	8
United States Paper Exports Ass'n v. *Bowers*, 80 F. (2d) 82	8
Warner v. *Walsh*, 15 F. (2d) 367	11
White v. *Stone*, 78 F. (2d) 136, certiorari denied, 296 U. S. 596	8

Statutes:

Judicial Code:	
Sec. 24 (U. S. C., Title 28, sec. 41)	18
Sec. 145 (U. S. C., Title 28, sec. 250)	19
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 219	13
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 284	14
Sec. 1001 (U. S. C., Title 26, secs. 641, 644, 645)	14
Sec. 1005 (U. S. C., Title 26, sec. 640)	14

Statutes—Continued.

	Page
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 322	16
Sec. 607 (U. S. C., Title 26, sec. 1670)	17
Sec. 610 (U. S. C., Title 26, sec. 1646)	17
Revised Statutes:	
Sec. 3226 (U. S. C., Title 26, sec. 1672)	18

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There was no opinion by the District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

May 18, 1936 (R. 40–41). The petition for writ of certiorari was filed August 14, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of mandamus should issue to compel the Commissioner of Internal Revenue to refund to a trustee overpayments of taxes found by the Board of Tax Appeals to have been made on the income of the trust for certain years, the beneficiary of the trust having been erroneously refunded the taxes paid by her on the income received from the trust during some of those years and having paid no tax on the income received from the trust for one of the years, when the recovery of the refunds from the beneficiary, in an affirmative action, and the assessment and collection of the unpaid tax are barred by the statute of limitations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13–19.

STATEMENT

The case was heard and decided on demurrer to the answer (R. 29). The material facts appearing from the allegations of the petition and answer (R. 2–25) are as follows:

Petitioner is the trustee under the will of John A. Brown, Jr., deceased, and instituted this suit in that capacity. The decedent died testate July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania. By the terms of his will his residuary estate was bequeathed to petitioner, in trust, to collect the income and after payment of certain expenses to distribute the net, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, for life, and any excess above that amount to his children (R. 2–3, 7–16). The widow elected to take under the will in lieu of dower or statutory rights. Petitioner received the property in December 1920, and has since continued to act as trustee (R. 3).

During the years 1924 to 1930, inclusive, petitioner currently distributed to the widow the entire net income of the trust estate and, pursuant to the requirements of Section 219 of the Revenue Act of 1924 and corresponding provisions of the Revenue Acts of 1926 and 1928 (Appendix, *infra*, p. 13), duly filed with the Collector of Internal Revenue income tax returns for the trust estate for each of those years, deducting from the net income of the estate the amounts distributed to the widow. The widow reported all such distributions for the years 1924 to 1927, inclusive, in her income tax returns, and paid a tax thereon. In her return for the year 1928, however, the widow did not include as a part of her taxable income the income

received by her from the trust during that year (R. 3).

On March 15, 1929, the Commissioner of Internal Revenue duly asserted deficiencies against petitioner for the years 1924 and 1925, basing his action upon a disallowance of the deduction of the amounts distributed to the widow. On May 11, 1929, petitioner appealed to the Board of Tax Appeals, which, on June 23, 1931, entered its decision sustaining the asserted deficiencies of $30,278.28 for 1924, and $16,580.85 for 1925. On December 21, 1931, a petition for review of the Board's decision was filed in the Circuit Court of Appeals for the Third Circuit, but the assessment and collection of the deficiencies not having been stayed pending review by the filing of a bond under the provisions of Section 1001 of the Revenue Act of 1926 (Appendix, *infra*, pp. 14–15), they were assessed against and paid by petitioner on February 10, 1932, together with interest of $18,279.01 (R. 3–4, 18.) On April 26, 1933, the Circuit Court of Appeals reversed the decree of the Board and, pursuant to the mandate of the appellate court, on July 7, 1934, the Board entered its decision holding that there were no deficiencies due from petitioner for the years 1924 and 1925, but that, pursuant to a stipulation, there were overpayments for such years in the respective amounts paid on February 10, 1932 (R. 4). That decision became final on August 7, 1934, under the provisions of Section

1005 of the Revenue Act of 1926 (Appendix, *infra*, pp. 15–16).

Under date of January 22, 1931, the Commissioner had asserted a deficiency in the amount of $10,262.28 against petitioner for the year 1928. On March 6, 1931, petitioner appealed to the Board of Tax Appeals from that determination and the Board, on September 29, 1934, entered a decision pursuant to stipulation, that petitioner had overpaid its taxes for the year 1928 in the amount of $4,376.39. No petition for review of that decision was filed (R. 4–5) and it became final on December 29, 1934. Section 1005, *infra*.

The widow, in the meantime, had filed claims for refund of the taxes paid during the years 1924 to 1927, inclusive, on that portion of her income received from the trust during those years on the ground that the income represented a return of her dower and/or statutory rights which she had relinquished when she had elected to take under her husband's will (R. 23). The Commissioner allowed substantially, though not exactly, the amounts claimed on the grounds asserted in the claims, refunding to her in September 1931, an aggregate of $60,636.12 as taxes, together with statutory interest thereon in the amount of $17,588.73 (R. 24). No part of these refunds have been repaid by the widow (R. 25).

The tax that would have been payable by the widow on the income she received from the trust

during the year 1928 would have been in excess of $4,376.39, the amount of the overpayment found by the Board to have been made by petitioner on its income for that year (R. 24).

There are no income, war-profits, or excess profits taxes or instalments thereof due from petitioner on any income taxable to it, as such trustee, for any of the years 1924 to 1928, inclusive (R. 5, 19).

This action was instituted on February 20, 1935 (R. 2). The petition prayed that respondent be commanded and directed to refund to petitioner the sum of $65,138.14 and the sum of $4,376.39, representing the amounts of overpayments found by the Board, together with statutory interest on both amounts (R. 6).

The petition alleged a demand upon respondent and the latter's refusal to refund the overpayments (R. 5). The answer denied that there had been any demand for the refund of the overpayments for the years 1924 and 1925 except that on January 26, 1934, petitioner had filed claims for refund of these amounts. Respondent admitted that those claims for refund had neither been allowed nor rejected, alleging that they were still under his consideration, and that the claims had been on file more than six months at the time this suit was instituted (R. 19–21). With reference to the overpayment for 1928, respondent denied that there had been a formal demand for a refund,

alleging that petitioner had, by counsel, orally and by informal correspondence requested the refund. Respondent admitted that he had not made the refund, but denied that he had refused it, averring that it was under consideration (R. 20–23).

The answer further resisted issuance of the writ on the grounds that it sought to control the exercise of his discretion; that the petitioner had an adequate and complete remedy at law; and that the petition was premature and untimely because it failed to show a formal demand for the refunds and/or a positive refusal, or acts tantamount thereto, to make the same (R. 21–22). The answer further asserted that petitioner in equity and good conscience was not entitled to the relief prayed for, since petitioner and the widow were the same parties in interest, the petition was for the widow's sole benefit, and any relief granted would unjustly enrich her because the refunds made to her were erroneously and mistakenly made and had not been repaid and because she had failed to pay any tax on the income she received from the trust during 1928 (R. 24–25).

Petitioner's demurrer to the answer (R. 26–29) was overruled by the District Court for the District of Columbia and, petitioner electing to stand thereon, the petition was dismissed (R. 29). The decision was affirmed on appeal by the United States Court of Appeals for the District of Columbia (R. 40).

91432—36——2

ARGUMENT

Except for procedural differences the instant case is very similar to the case of *White* v. *Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, 296 U. S. 596.[1] Both Stone and the present petitioner sought, as trustees, to secure for the benefit of the beneficiary a refund of taxes improperly assessed against and paid by them, after recovery by the Government from the proper taxpayer—the beneficiary—had become impossible. The proceeding in the *Stone* case was an action for money had and received, and it was held that, under the circumstances, an equitable set-off should be allowed. Morton, J., concurred on the ground that an action for money had and received is equitable in character, and in order to recover plaintiff must show that defendant has money which in equity and good conscience he ought not to retain, and plaintiff could make no such showing. *Champ Spring Co.* v. *United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Lewis* v. *Reynolds*, 284 U. S. 281; *Myers* v. *Hurley Motor Car Co.*, 273 U. S. 18; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386; *Bull* v. *United States*, 295 U. S. 247. See also *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82 (C. C. A. 2d). The court below held that there was no reason why the same principle should not apply here, invoking the

[1] Time for filing a petition for rehearing has been extended to November 2, 1936.

well-established principle that a writ of mandamus issues not as a matter of right, but only in the exercise of sound judicial discretion and to compel the performance of an act which in equity and good conscience ought to be performed. *United States* v. *Dern*, 289 U. S. 352, 359; *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311. It is submitted that the decision is correct.

Petitioner urges, however, that the present case should have been distinguished from the *Stone* case, *supra*, because in the latter the Government's claim against the beneficiary was for taxes due for the same years for which the trustee had overpaid its taxes, whereas in the instant case the claims against the beneficiary are for erroneous refunds as well as for taxes, and cover years other than those for which the trustees paid excessive taxes. The court below properly held that the moral obligation to repay erroneous refunds or taxes for other years was equally as strong as the moral obligation in the *Stone* case.

Petitioner further contends that because the erroneous refunds made to the widow for the years 1927 and 1928 were not matched by corresponding overpayments for those years by the trustee, the decision is in conflict with *United States* v. *Irving Trust Co.*, 77 F. (2d) 852 (C. C. A. 2d). In that case a trustee in bankruptcy sought, unsuccessfully, to resist a claim for taxes due from the bankrupt for the year 1927 by a set-off of an overpay-

ment of taxes for the year 1931, after recovery of the overpayment had been barred by limitation. It seems clear that the decision below neither specifically nor inferentially permits a credit or a recoupment of the nature attempted in the *Irving Trust* case. The basis of the decision below is that petitioner in equity and good conscience has not shown a right to the exercise of the court's power in its behalf. The court specifically (R. 37) put aside as unnecessary to the decision a consideration of the right of the Government to a credit, counterclaim, or recoupment of the erroneous refunds made to the widow. Petitioner, to recover, must rely on the strength of its own case (*Champ Spring Co.* v. *United States, supra*) which it has not been able to demonstrate. The answer interposed by respondent, setting forth the facts of the erroneous refunds to the widow for the years 1924 to 1927 and her failure to pay any tax on the income of the trust for the year 1928, does not pray for any specific relief. It merely states uncontroverted facts and the ultimate conclusion to be drawn from them, namely, that the widow beneficiary being the real party in interest in this suit, respondent in equity and good conscience should not be directed to refund to petitioner the amounts prayed for in its petition.

In addition to the fact that the decisions on the present question are in accord, there is a further

reason why the present petition should be denied. Petitioner, by invoking mandamus instead of an ordinary legal remedy, has subjected its claim to the discretion of the court (*National Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 301), and while this Court in the exercise of its power of general supervision over the decisions of the lower courts may properly review the action taken there on applications for mandamus, it appears to be its settled policy, exclusive of all other considerations, not to disturb a decision when it represents the exercise of the sound judicial discretion of the court below. *Arant* v. *Lane*, 249 U. S. 367, 371; *United States* v. *Dern, supra; Duncan Townsite Co.* v. *Lane, supra.* The possibility of conflicts among the decisions of courts yet to pass on similar claims presented in ordinary legal actions,[2] when the discretionary powers of those courts will be less emphasized, is, therefore, no basis for the allowance of the present petition.

---

[2] Such cases originated by reason of an unfortunate conflict of authorities (*Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d); *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st); *Allen* v. *Brandeis*, 29 F. (2d) 363 (C. C. A. 8th), prevailing prior to the decision of this Court in *Helvering* v. *Butterworth*, 290 U. S. 365. The case of the *First Nat. Bank of Birmingham* v. *United States*, 12 F. Supp. 301 (N. D. Ala.), now on appeal, is the only other decided case in this category and is in accord with the decision in the *Stone* case.

CONCLUSION

The decision below was rendered in accordance with the decisions of this Court. There is no conflict of authority. The petition should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
J. LOUIS MONARCH,
THOMAS G. CARNEY,
Special Assistants to the Attorney General.
CHARLES A. HORSKY,
Attorney.

SEPTEMBER 1936.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

ESTATES AND TRUSTS

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries.

* * * * *

(b) * * * The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

* * * * *

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

* * * * *

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

* * * * *

COURT REVIEW OF BOARD'S DECISION

SEC. 1001 [as amended]. (a) The decision of the Board rendered after the enactment

of this Act [1] * * * may be reviewed by a Circuit Court of Appeals, * * * if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.[2]

* * * * *

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review * * * is duly filed by the taxpayer, and then only if the taxpayer * * * has filed with the Board a bond * * * conditioned upon the payment of the deficiency as finally determined, * * *.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, * * * (U. S. C., Title 26, Secs. 641, 644, 645).

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if

---

[1] Revenue Act of 1926, approved February 26, 1926.

[2] Three months, under Section 1101 of 1932 Act (U. S. C., Title 26, Sec. 642).

no such petition has been duly filed within such time; * * * (U. S. C., Title 26, Sec. 640).

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322 [as amended, c. 277, 48 Stat. 756, sec. 504 (a)]. REFUNDS AND CREDITS.

(a) *Authorization.*— Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) Period of Limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments, determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with

the decision of the Board which has become final; * * *

* * * * *

(d) *Overpayments found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within two years before the filing of the claim or the filing of the petition, whichever is earlier.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim (U. S. C., Title 26, Sec. 1670).

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of

such refund or before May 1, 1928, whichever date is later (U. S. C., Title 26, Sec. 1646).

Revised Statutes:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail (U. S. C., Title 26, Sec. 1672).

Judicial Code:

SEC. 24 [as amended]. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced (U. S. C., Title 28, Sec. 41).

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * * (U. S. C., Title 28, Sec. 250).

U. S. GOVERNMENT PRINTING OFFICE: 1936.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	7
Argument	9
Conclusion	24
Appendix	25

CITATIONS

Cases:	
Allen v. *Brandeis*, 29 F. (2d) 363	20
Board of Commissioners of Knox County v. *Aspinwall*, 24 How. 376	13
Bull v. *United States*, 295 U. S. 247	23
Champ Spring Co. v. *United States*, 47 F. (2d) 1, certiorari denied, 283 U. S. 852	21
Chicago Great Western Railroad Co. v. *Interstate Commerce Commission*, 294 U. S. 50	16–17
Commonwealth v. *Boutwell*, 13 Wall. 526	13
Crossett Lumber Co. v. *United States*, 87 F. (2d) 930	21
Decatur v. *Paulding*, 14 Pet. 497	17
Dickerman & Englis, Inc., v. *Commissioner*, 5 B. T. A. 633	11
Duncan Townsite Co. v. *Lane*, 245 U. S. 308	17
First Nat. Bank of Birmingham v. *United States*, 12 F. Supp. 301	21
Helvering v. *Butterworth*, 290 U. S. 365	20
W. H. Hill Co. v. *Commissioner*, 23 B. T. A. 605, affirmed, 64 F. (2d) 506, certiorari denied, 290 U. S. 691	14
International Contracting Co. v. *Lamont*, 155 U. S. 303	13
James v. *United States*, 38 F. (2d) 140	12
Jones v. *Commissioner*, 34 B. T. A. 280	11, 24
Kendall v. *United States*, 12 Pet. 524	17
Lit v. *United States*, decided February 26, 1937	21
Louisiana v. *McAdoo*, 234 U. S. 627	13
National Fire Ins. Co. v. *United States*, 52 F. (2d) 1011	11, 12
Ohio Steel Foundry Co. v. *United States*, 38 F. (2d) 144	12
Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716	11
Redfield v. *Windom*, 137 U. S. 636	17

139501—37——1

Cases—Continued. Page

Reeside v. *Walker*, 11 How. 271 ..... 10, 13
Rose v. *McEachern*, 86 F. (2d) 231 21
Rouland, Ex parte, 104 U. S. 604 13
Secretary v. *McGarrahan*, 9 Wall. 298 13
Stone v. *White*, No. 202 ..... 10, 16, 18, 20, 23
Title Guarantee L. & T. Co. v. *Commissioner*, 63 F. (2d) 621 20
Turner v. *Fisher*, 222 U. S. 204 17
United States v. *Bolster*, 26 F. (2d) 760 20
United States v. *Dern*, 289 U. S. 352 17
United States ex rel. Dunlap v. *Black*, 128 U. S. 40 17
United States v. *Guthrie*, 17 How. 284 17
United States v. *Wilbur*, 283 U. S. 414 ..... 13, 15
United States Paper Exports Ass'n v. *Bowers*, 80 F. (2d) 82 21
Warner v. *Walsh*, 15 F. (2d) 367 20
Wilbur v. *United States*, 281 U. S. 206 15
Winn, In re, 213 U. S. 458 10
Work v. *Rives*, 267 U. S. 175 13
Wynne v. *Commissioner*, 77 F. (2d) 473 11

Statutes:

Judicial Code:
Sec. 24, as amended (U. S. C., Title 28, Sec. 41) 32
Sec. 145 (U. S. C., Title 28, Sec. 250) 32
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 219 25
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 284 ..... 12, 14, 26
Sec. 1001, as amended (U. S. C., Title 26, Secs. 641, 644, 645) 26
Sec. 1005 (U. S. C., Title 26, Sec. 640) 27
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 272 ..... 14, 28
Sec. 322 ..... 9, 11, 12, 14, 28
Sec. 507 ..... 14, 29
Sec. 607 (U. S. C., Title 26, Sec. 1670) 30
Sec. 610 (U. S. C., Title 26, Sec. 1646) 30
Revised Statutes, Sec. 3220, as amended by Sec. 1111 of the Revenue Act of 1928, c. 27, 44 Stat. 115 ..... 14, 30
Sec. 3228, as amended by Sec. 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 116 31

Miscellaneous:

High, *Extraordinary Legal Remedies* (3d ed.) Sec. 15 10

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

There was no opinion by the District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) is reported in 85 F. (2d) 230.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

May 18, 1936. (R. 40–41.) The petition for writ of certiorari was filed August 14, 1936, and granted March 15, 1937. (R. 42.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Should a writ of mandamus issue to compel the Commissioner of Internal Revenue to refund to a trustee taxes found by the Board of Tax Appeals to have been overpaid on the income of the trust, when the refunds would go to the beneficiary of the trust who is obligated to the Government for taxes or erroneous refunds of taxes on the trust income distributed to her, in an amount greater than the overpayments made by the trustee, and enforcement of the beneficiary's liability is barred by the statute of limitations?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 26–33.

STATEMENT

The case was heard and decided on demurrer to the answer of the Commissioner. (R. 29.) The material facts appearing from the allegations of the petition and answer (R. 2–25) are as follows:

Petitioner is the trustee under the will of John A. Brown, Jr., deceased, and instituted this suit in

that capacity. The decedent died testate July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania. By the terms of his will his residuary estate was bequeathed to petitioner in trust, to distribute the net income, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, during her life, and any excess above that amount to his children. (R. 2–3, 7–16.) The widow elected to take under the will in lieu of dower or statutory rights. Petitioner received the property in December, 1920, and has since continued to act as trustee. (R. 3.)

During the years 1924 to 1930, inclusive, petitioner currently distributed to the widow the entire net income of the trust estate and, pursuant to the requirements of Section 219 of the Revenue Act of 1924, and corresponding provisions of the Revenue Acts of 1926 and 1928 (Appendix, *infra*, p. 25) duly filed with the Collector of Internal Revenue income tax returns for the trust estate for each of those years, deducting from the net income of the estate the amounts distributed to the widow. The widow reported all such distributions for the years 1924 to 1927, inclusive, in her income tax returns, and paid a tax thereon. In her return for the year 1928, however, the widow did not include as a part of her taxable income the income received by her from the trust during that year. (R. 3.)

On March 15, 1929, the Commissioner of Internal Revenue duly asserted deficiencies against petitioner for the years 1924 and 1925, basing his action upon a disallowance of the deduction of the amounts distributed to the widow. On May 11, 1929, petitioner appealed to the Board of Tax Appeals, which, on June 23, 1931, entered its decision sustaining the asserted deficiencies of $30,278.28 for 1924, and $16,580.85 for 1925. On December 21, 1931, a petition for review of the Board's decision was filed in the Circuit Court of Appeals for the Third Circuit. Since the assessment and collection of the deficiencies had not been stayed pending review by the filing of a bond under the provisions of Section 1001 of the Revenue Act of 1926 (Appendix, *infra,* pp. 26–27), they were assessed against and paid by petitioner on February 10, 1932, together with interest of $18,279.01. (R. 3–4, 18.) On April 26, 1933, the Circuit Court of Appeals reversed the decree of the Board and, pursuant to the mandate of the appellate court, on July 7, 1934, the Board entered its decision holding that there were no deficiencies due from petitioner for the years 1924 and 1925, but that there were overpayments for such years in the respective amounts paid on February 10, 1932. (R. 4.) That decision became final on August 7, 1934, under the provisions of Section 1005 of the Revenue Act of 1926 (Appendix, *infra,* p. 27).

Under date of January 22, 1931, the Commissioner had asserted a deficiency in the amount of

$10,262.28 against petitioner for the year 1928. On March 6, 1931, petitioner appealed to the Board of Tax Appeals from that determination and the Board, on September 29, 1934, entered a decision pursuant to stipulation, that petitioner had overpaid its taxes for the year 1928 in the amount of $4,376.39. No petition for review of that decision was filed (R. 4–5), and it became final on December 29, 1934. Section 1005, *infra*.

The widow, in the meantime, had filed claims for refund of the taxes paid during the years 1924 to 1927, inclusive, on that portion of her income received from the trust during those years on the ground that the income represented a return of her dower and/or statutory rights which she had relinquished when she had elected to take under her husband's will. (R. 23.) The Commissioner allowed substantially, though not exactly, the amounts claimed on the grounds asserted in the claims, refunding to her in September, 1931, an aggregate of $60,636.12 as taxes, together with statutory interest thereon in the amount of $17,588.73. (R. 24.) No part of these refunds have been repaid by the widow. (R. 25.)

The tax that should have been paid by the widow on the income she received from the trust during the year 1928 is in excess of $4,376.39, the amount of the overpayment found by the Board to have been made by petitioner on its income for that year. (R. 24.)

There are no income, war-profits, or excess profits taxes or installments thereof due from petitioner on any income taxable to it, as such trustee, for any of the years 1924 to 1928, inclusive. (R. 5, 19.)

This action was instituted on February 20, 1935. (R. 2.) The petition prayed that respondent be commanded and directed to refund to petitioner the sum of $65,138.14, and the sum of $4,376.39, representing the amounts of overpayments found by the Board, together with statutory interest on both amounts. (R. 6.)

The petition alleged a demand upon respondent and the latter's refusal to refund the overpayments. (R. 5.) The answer denied that there had been any demand for the refund of the overpayments for the years 1924 and 1925, except that on January 26, 1934, petitioner had filed claims for refund of these amounts. Respondent admitted that those claims for refund had neither been allowed nor rejected, alleging that they were still under his consideration, and that the claims had been on file more than six months at the time this suit was instituted. (R. 19–21.) With reference to the overpayment for 1928, respondent denied that there had been a formal demand for a refund, alleging that petitioner had, by counsel, orally and by informal correspondence requested the refund. Respondent admitted that he had not made the refund, but denied that he had refused it, averring that it was under consideration. (R. 20–23.)

The answer further resisted issuance of the writ on the grounds that it sought to control the exercise of his discretion; that the petitioner had an adequate and complete remedy at law; and that the petition was premature and untimely because it failed to show a formal demand for the refunds and/or a positive refusal, or acts tantamount thereto, to make the same. (R. 21–22.) The answer further asserted that petitioner in equity and good conscience was not entitled to the relief prayed for, since petitioner and the widow were the same parties in interest, and any relief granted would inure to the sole benefit of the widow and would unjustly enrich her, because the refunds made to her were erroneously and mistakenly made and had not been repaid, and because she had failed to pay any tax on the income she received from the trust during 1928. (R. 24–25.)

Petitioner's demurrer to the answer (R. 26–29) was overruled by the District Court for the District of Columbia, and, petitioner electing to stand thereon, the petition was dismissed. (R. 29.) The decision was affirmed on appeal by the United States Court of Appeals for the District of Columbia. (R. 40.)

SUMMARY OF ARGUMENT

1. Mandamus is an inappropriate remedy here, because petitioner has an adequate and complete remedy in ordinary proceedings at law. The right of petitioner to a refund of the amounts deter-

mined to be overpayments by the Board of Tax Appeals may be tested in suits at law in the United States District Courts or the Court of Claims, and the statutes contemplated that procedure.

2. Mandamus is also inappropriate because the granting of a refund of taxes is discretionary rather than ministerial. Moreover, even if there were a duty to make a refund, that duty is not clear and indisputable here, since there are legal doubts as to whether petitioner is entitled to the sums which it seeks. Mandamus cannot be issued as a substitute for ordinary legal proceedings.

3. However, even if mandamus were an appropriate remedy, petitioner is not in equity and good conscience entitled to the issuance of a writ in this case. Although the remedy by mandamus is at law, its allowance is not a matter of right, but is controlled by equitable principles and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. The record here shows that if petitioner receives the refunds which it seeks, the money will immediately go to the beneficiary, who owes a greater amount to the Government in taxes on the income distributed to her by the trust than the amount which the petitioner here seeks. Nevertheless, recovery from the beneficiary is barred by the statute of limitations. Neither petitioner nor the beneficiary will be prejudiced or injured

by the denial of a writ of mandamus, while the granting of a writ would be highly inequitable to respondent. Under these facts, the writ was properly denied.

4. Furthermore, the same defense of recoupment is available here as is available in *Stone* v. *White*, No. 202, argued herewith. Petitioner seeks refunds of taxes paid for the years 1924, 1925, and 1928 on income earned by the trust and distributed to the beneficiary. The beneficiary to whom these refunds will go, if secured, owes the Government taxes, or erroneous refunds of taxes, on the same income for the same years. The liability of the beneficiary is, however, barred by the statute of limitations. In this situation, respondent is entitled to recoup the liability of the widow against the sums sought to be recovered by petitioner.

ARGUMENT

The Board of Tax Appeals found that the petitioner overpaid its income taxes for the years 1924, 1925 and 1928. The statute, in such cases, provides that the amount of such overpayment shall be credited or refunded to the taxpayer. Sec. 322 (d), Revenue Act of 1928, *infra*, p. 29. The Commissioner failed to refund the amount of such overpayments, on the ground that the beneficiary of the trust of which petitioner is trustee owes the Government a large amount in taxes; and that, while the statute has run against the collection from the beneficiary, it would be inequitable under

the circumstances to make refund to the trustee since such refunds would inure to the benefit of the beneficiary. The circumstances actuating the Commissioner in adopting this course are, as we shall show, substantially the same as those presented in *Stone* v. *White*, No. 202, argued herewith; and for the reasons set forth in our brief in that case we believe the Commissioner was fully justified in the position taken, and the court below so held. But, before discussing the merits, there is a procedural objection which should be called to the Court's attention.

1. The petitioner has chosen mandamus as the means of testing its right to the overpayment. In this, we believe, it erred. Mandamus is an inappropriate remedy in a case of this kind and the petition for the writ should not have been entertained.

It is well settled that the extraordinary remedy of mandamus will not lie where an adequate, complete, and specific remedy at law exists. *In re Winn*, 213 U. S. 458, 466–467; *Reeside* v. *Walker*, 11 How. 271, 291; High on Extraordinary Legal Remedies (3d ed.), Sec. 15.

It is clear that the petitioner here has an adequate, complete, and specific remedy at law. Failing to secure its refund of the overpayment found by the Board, it should have brought its action at law either in the District Court or in the Court of Claims to enforce payment.

The Board of Tax Appeals is a tribunal of limited jurisdiction. It has no authority to order refunds or grant judgments. Its function is to determine whether the Commissioner of Internal Revenue has correctly computed the taxes for a given year, upon which the Commissioner has asserted a deficiency against the taxpayer. Even if, in carrying out this function, the Board finds that there has been an overpayment, that finding is not a determination that the taxpayer is entitled to a credit or refund of that amount. *Jones* v. *Commissioner,* 34 B. T. A. 280; *Dickerman & Englis, Inc.* v. *Commissioner,* 5 B. T. A. 633, 635; *National Fire Ins. Co.* v. *United States,* 52 F. (2d) 1011 (C. Cls.). Compare *Wynne* v. *Commissioner,* 77 F. (2d) 473 (C. C. A. 5th). The decision of the Board is, of course, *res judicata* as to the questions involved in the computation of the taxes of the taxpayer for the year under consideration (*Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716), but such decision is not binding as to issues over which the Board has no jurisdiction, and which could not have been raised in that proceeding. Once it has determined a deficiency, or, as in this case, an overpayment of taxes for the year, its duty ends, and its determination does not go to the right of the taxpayer to a refund.

When the Board determines an overpayment the statute provides that such amount shall be refunded or credited (Sec. 322 (d), *infra*), and it

becomes the duty of the Commissioner either to apply the amount against other taxes due from the taxpayer or to schedule for refund any excess. Should the Commissioner fail to do this or should he make an erroneous credit, the taxpayer's course is to bring suit either in the District Court or the Court of Claims. This course is clearly contemplated by the statute. Sec. 284 (d) (2d) of the Revenue Act of 1926, and Sec. 322 (c) (1) and (2) of the Revenue Act of 1928, *infra*, pp. 26, 29. And this is the course which aggrieved claimants take. As pointed out in the case of *National Fire Ins. Co.* v. *United States, supra* (pp. 1013–1014):

> * * * in cases where the Board of Tax Appeals determines an overpayment and no question of credits is involved, and the refund of the overpayment was not barred by the statute of limitation at the time of the decision by the board, suit might be brought within six years from the date the right to the overpayment accrued as for a claim against the United States in the event the commissioner refused to refund the overpayment determined by the board. * * *

See also *James* v. *United States*, 38 F. (2d) 140, 142 (C. Cls.); *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 149 (C. Cls.).

In such proceeding before the District Court or the Court of Claims the taxpayer could secure a final adjucation of the right of the Commissioner to apply its overpayment against the claim of the Government against the beneficiary.

It is respectfully submitted that petitioner has an adequate legal remedy elsewhere and mandamus is inappropriate.

2. There is another reason why mandamus is improper. It is, of course, elementary that mandamus will only lie to enforce a ministerial, as distinguished from a discretionary, duty. Moreover, the duty to be enforced must be a duty which exisits at the time when the application for the mandamus is made. As stated by this Court in *Ex parte Rowland,* 104 U. S. 604, 612, "it is also settled that more cannot be required of a public officer by *mandamus* than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one." Moreover, the obligation must be both peremptory and plainly defined. The law must not only authorize the act (*Commonwealth* v. *Boutwell,* 13 Wall. 526), but it must *require* the act to be done. *Reeside* v. *Walker,* 11 How. 272; *Secretary* v. *McGarrahan,* 9 Wall. 298; and the duty must be "clear and indisputable." *Board of Commissioners of Knox County* v. *Aspinwall,* 24 How. 376; *International Contracting Co.* v. *Lamont,* 155 U. S. 303, 308; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175; *United States* v. *Wilbur,* 283 U. S. 414, 420. It is submitted that under these principles mandamus does not lie to compel a refund of the overpayment found by the Board.

The duties of the Commissioner, under the circumstances, are discretionary and not ministerial.

Under Section 3220 of the Revised Statutes, as amended, *infra,* p. 30, the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, is *authorized* to refund taxes erroneously collected. However, when the Board of Tax Appeals has found that the taxpayer has made an overpayment, and such decision has become final, the statute (Sec. 507, Revenue Act of 1928, *infra*), provides that such amount "*shall* be *credited or* refunded" as provided in Section 284 (a) of the Revenue Act of 1926, *infra.* That section provides that "where there has been an overpayment, * * * the amount of such overpayment shall * * * be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer." See also Section 322 (a) and (d), Revenue Act of 1928, pp. 28–29, *infra.* The question of whether other taxes are due is, of course, a question left largely within the judgment of the Commissioner. (See Sec. 272, Revenue Act of 1928, *infra.*) Thus, the statute imposes the dual duty on the Commissioner, in cases where the Board has found an overpayment, either to credit or to refund. It has been said that "the matter of the application of the credits is generally within the sound discretion of the Commissioner." *W. H. Hill Co.* v. *Commissioner,* 23 B. T. A. 605, 609, affirmed, 64 F. (2d) 506 (C. C. A. 6th), certiorari denied, 290 U. S. 691. And it

would seem that while mandamus may lie to compel the Commissioner to take action in the matter and either to make the refund or the credit, clearly it will not be used to compel a refund if, in his judgment, other taxes are due from the taxpayer. See *Wilbur* v. *United States,* 281 U. S. 206, 218. Even though the Commissioner be wrong in his decision that other taxes are due, and erroneously applies the overpayment, the remedy lies in a suit at law and not by way of mandamus. Mandamus will not be used to test the legality of the Commissioner's action or to correct his mistake. It lies, as has been said, only to compel the performance of ministerial duties presently existing, not to create new duties. It "cannot be made to serve the purpose of an ordinary suit." *United States* v. *Wilbur,* 283 U. S. 414, 420.

In this case, it appears from the petition for mandamus (R. 5) that the Commissioner has based his refusal to make the refund, on the ground that he was entitled to apply the overpayments of the trustee to the extinguishment of certain barred claims against the beneficiary of the trust. Thus, it appears from the petition itself that the Commissioner has determined to make a credit rather than a refund. True, he undertakes to credit the overpayment against taxes due by the beneficiary rather than those due by the trustee, but it also appears from the petition and admitted answer that the beneficiary is the real party in interest and that any recovery will inure to her benefit.

It further appears that both claims, that of the Commissioner and that of the taxpayer, grow out of the same trust income, in which the beneficiary alone is interested. It further appears that both claims have their roots in an administrative mistake induced by erroneous decisions of three Circuit Courts of Appeals, which mistake was shared in by the beneficiary, who is the real party in interest. It further appears that were the refund to be made it would result in an unjust enrichment to the real party in interest, and the court below has held that such refund would be inequitable. It further appears that the circumstances actuating the Commissioner were substantially the same as those presented in *Stone* v. *White,* No. 202, October Term, 1935, and, as appears from our brief filed in that case simultaneously herewith, the Commissioner was clearly warranted in adopting the course he did. Under these circumstances, it certainly cannot be said that the Commissioner was under a "clear and indisputable" duty to make the refund. Questions of law were presented that called for the exercise of judgment on the part of the Commissioner. In his position of public trust, guardian of the public purse, it can not be said that his obligation was so peremptory and plainly defined as to leave no doubt as to his duty. Even if the Commissioner were mistaken in his view of the law such mistake can and should be corrected elsewhere, and not by mandamus. As was recently said by this Court in *Chicago Great Western Railroad*

Co. v. *Interstate Commerce Commission,* 294 U. S. 50, 63, "where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body." Cf. *Kendall* v. *United States,* 12 Pet. 524; *Decatur* v. *Paulding,* 14 Pet. 497; *United States* v. *Guthrie,* 17 How. 284; *United States ex rel Dunlap* v. *Black,* 128 U. S. 40; *Redfield* v. *Windom,* 137 U. S. 636, 646.

3. Even if mandamus were an appropriate remedy in these cases, petitioner here is not entitled in equity and good conscience to the issuance of a writ. Although the remedy by mandamus is at law, its allowance is controlled by equitable principles and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. *United States* v. *Dern,* 289 U. S. 352, 359. Mandamus is not a writ of right. It issues to remedy a wrong, not to promote one. It is granted to compel the performance of a duty which ought to be perfomed, not to direct an act which will work a public or private mischief. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311; *Turner* v. *Fisher,* 222 U. S. 204, 209. Even if, therefore, it were to be held that mandamus was an appropriate remedy in situations where the Board of Tax Appeals had determined an overpayment, before a writ of mandamus

may be secured in such a case the taxpayer must show that in equity and good conscience he is entitled to the relief which he seeks, just as in an action for money had and received, like that in *Stone* v. *White,* a taxpayer must show that in equity and good conscience he is entitled to a recovery.

Since the facts here are substantially the same as the facts in *Stone* v. *White,* we respectfully refer the Court to our argument on pages 14–21 of that brief on the lack of equity inherent in the position of the taxpayers in these cases. The only way in which this case differs from *Stone* v. *White* is that here the widow is liable for taxes on income distributed to her by petitioner for two years—1926 and 1927—as to which no taxes were assessed against petitioner and no refund is sought by petitioner in this case. This fact, however, does not make any the less inequitable the relief which petitioner seeks.

While the taxes for 1924, 1925, and 1928 were erroneously assessed against the trust, and the trustee is the nominal plaintiff in this case, the right being sued upon is in reality the right of the widow. There is vested in her what amounts to a property right in this cause of action. The widow herself has paid or must ultimately pay the taxes assessed against the trust through the *pro tanto* reduction of the income distributed to her by petitioner. Under the codicil to the will (R. 14–16),

the widow was entitled to all of the income from the trust up to the amount of $200,000 per annum, but in determining that income, all taxes payable by the trust were to be deducted. Since the income of the trust during the years in question was less than $200,000, and was all paid to the widow (R. 3), the taxes paid by the trust in this case were a legal charge on that income and must be borne by the widow.

Looking at the substance and equity of this proceeding, then, as we must do to determine whether petitioner is entitled to the relief which it seeks, we find that the taxes on the trust income, which petitioner seeks to recover, have been in reality paid by the widow herself and that they were not greater in total amount than the amount owing by her to the Government for taxes due and for erroneous refunds of taxes paid on the trust income. She has not been injured by the erroneous method of the collection of these taxes. On the contrary, she has benefited thereby, because through the trustee she has paid less in taxes on the income of the trust than she would have paid if the taxes had been collected directly from her. Consequently, the denial of a writ of mandamus by the courts below has worked no inequity or hardship upon her, nor has that denial worked any inequity or hardship upon petitioner, since petitioner has recouped, or has the right to recoup, out of the income payable to the widow the taxes which it has paid to the Government.

But petitioner argues that there is no equity in respondent's position, because that position resulted from official neglect and inaction. On the contrary, however, the Government officials had an entirely reasonable basis for believing that the law was settled by the concurring opinions of three Circuit Courts of Appeals[1] and were justified in refunding the taxes to the widow on the strength of those decisions and on the strength of the decision of the Board of Tax Appeals upholding the assessments for 1924 and 1925 on this income against petitioner. It is true that a few months before the expiration of the two year statute of limitations on the recovery of these refunds, one Circuit Court of Appeals announced for the first time the contrary doctrine.[2] We submit, however, that the Government officials were still justified in acting on the basis of the decisions of the three Circuits, and cannot be said to have been guilty of laches in not instituting law suits on the large number of refunds made in cases of this type until this Court finally settled the matter in *Helvering* v. *Butterworth*, 290 U. S. 365. At that time it was too late to recover from the widow.

Nevertheless, irrespective of the reasonableness of the Government's reliance on these decisions of

---

[1] *Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d); *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st); *Allen* v. *Brandeis*, 29 F. (2d) 363 (C. C. A. 8th). See Government's brief in *Stone* v. *White*, No. 202, pp. 6–7.

[2] *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621 (C. C. A. 5th).

the Circuit Courts of Appeals, we think it clear that petitioner must depend here on the strength of its own case and not on any alleged weakness of the defense of its adversary. *Champ Spring Co.* v. *United States,* 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852 . Petitioner is seeking an extraordinary remedy to which it is entitled only if it shows an equitable as well as a legal right to the relief sought. We submit that petitioner has not made out a case in which justice and equity require the granting of the relief of mandamus. It was upon this ground that the court below arrived at its decision, and like considerations have produced like results in similar cases in other courts. See *Rose* v. *McEachern,* 86 F. (2d) 231 (C. C. A. 5th), pending on writ of certiorari, No. 750, 1936 Term); *Crossett Lumber Co.* v. *United States,* 87 F. (2d) 930 (C. C. A. 8th); *United States Paper Exports Ass'n* v. *Bowers,* 80 F. (2d) 82 (C. C. A. 2d); *Lit* v. *United States* (E. D. Pa.), decided February 26, 1937, not yet reported but may be found in 1937 CCH, Vol. 4, Par. 9142; *First Nat. Bank of Birmingham* v. *United States,* 12 F. Supp. 301 (N. D. Ala.). As was said by the Circuit Court of Appeals for the Second Circuit in *United States Paper Exports Ass'n* v. *Bowers, supra,* where the taxpayer sued for a conceded overpayment of taxes but the facts showed that if a refund were made it would go to the stockholders of a new corporation which had taken over the assets of the plaintiff cor-

poration, and that this new corporation had received an erroneous refund which was barred from recovery in an affirmative suit by the statute of limitations (p. 85):

> But it is argued that in any event an erroneous refund to American cannot create any liability on the part of United. This is answered by considerations already noted, namely, that the refund was received by American upon the same trusts as the original deposit and in so far as not used to pay United's taxes must be turned back to United's former shareholders; and that United's recovery in the present action will inure solely to their benefit. These shareholders, in whose behalf United sues, should therefore be treated as owing to the United States the refund received by American for their benefit. In equity and good conscience the government has a better right than have they, or the nominal plaintiff, to the sum of $30,841.49 which was due under the consolidated return and refunded in error.

So also, in this case, in equity and good conscience the Government has a better right than does the widow or the nominal plaintiff, the petitioner, to the sums which petitioner seeks. A writ of mandamus was properly denied by the courts below.

4. The defense of recoupment is also available to respondent in this case. In addition to the ultimate objection that in equity and good conscience the taxpayer is not entitled to a recovery, we have

made in *Stone* v. *White* the additional point that the same result was to be reached on the basis of the defense of recoupment. We believe that recoupment is also available and supported by the facts in this case.

For the years 1924 and 1925, erroneous refunds were made to the widow here of the taxes paid by her on the income distributed by petitioner to her in those years. For the year 1928, taxes were due and not paid by her on similar income. Petitioner, however, erroneously paid taxes on the same income for the same years and is now seeking to recover those payments, and it is alleged and admitted by demurrer that if petitioner secures a refund, the money will go to the widow. The question here is thus identical with that in *Stone* v. *White*, and we refer the Court to pages 9–14 in our brief in that case for the argument and authorities supporting the defense of recoupment. In the instant case the additional fact exists that the widow is liable for erroneous refunds of taxes paid on the trust income distributed to her in 1926 and 1927. Whatever doubt there may be as to whether the liability of the widow for those years may be said to be so connected with the taxes erroneously paid by petitioner on the trust income for the years 1924 and 1925 that they may be deemed to have arisen out of some feature of the same transaction (*cf. Bull* v. *United States*, 295 U. S. 247, 262), the defense of recoupment is clearly good in so far as

the liability of the widow for the erroneous refunds for 1924 and 1925, and for taxes in 1928, is concerned. That liability is properly applied, on principles of recoupment, to the overpayments made by petitioner of taxes on the same income for those same years.

The fact that the refunds, which petitioner here seeks, have been determined by the Board of Tax Appeals to be overpayments, does not foreclose this defense, since, as we have pointed out (*supra*, p. 11), the Board of Tax Appeals is a tribunal of limited jurisdiction, and this defense could not have been pleaded before or considered by the Board. *Jones* v. *Commissioner*, 34 B. T. A. 280.

CONCLUSION

We submit that the decision of the court below, that a writ of mandamus was properly denied in this case, was correct and should be affirmed.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
J. P. JACKSON,
F. A. LESOURD,
Special Assistants to the Attorney General.

APRIL 1937.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

ESTATES AND TRUSTS

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.

* * * * *

(b) * * * The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

* * * * *

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

* * * * *

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

* * * * *

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. [as amended by Section 603 of the Revenue Act of 1928, c. 852, 45 Stat. 791]. (a) The decision of the Board rendered after the enactment of this Act[1]

[1] Revenue Act of 1926, approved February 26, 1926.

* * * may be reviewed by a Circuit Court of Appeals, * * * if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.[2]

* * * * * *

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review * * * is duly filed by the taxpayer, and then only if the taxpayer * * * has filed with the Board a bond * * * conditioned upon the payment of the deficiency as finally determined, * * *.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, * * *. (U. S. C., Title 26, Secs. 641, 644, 645.)

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. (A) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *. (U. S. C., Title 26, Sec. 640.)

[2] Three months, under Section 1101 of the Revenue Act of 1932 (U. S. C., Title 26, Sec. 642).

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. * * *

SEC. 322 [as amended, c. 277, 48 Stat. 756, Sec. 504 (a)]. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments, determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final;

* * * * *

(d) *Overpayment found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within two years before the filing of the claim or the filing of the petition, whichever is earlier.

SEC. 507. OVERPAYMENTS FOUND BY BOARD OF TAX APPEALS.

Section 284 (e) of the Revenue Act of 1926 is amended to read as follows:

"(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). * * *."

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revised Statutes:

SEC. 3220 [as amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 115]. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-

revenue taxes collected by him, with the cost and expenses of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.

SEC. 3226 [as amended by Sec. 1113 of the Revenue Act of 1926, 44 Stat. 116]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

Judicial Code:

SEC. 24 [as amended]. The district courts shall have original jurisdiction as follows:

* * * * *.

Twentieth. * * * of any suit or proceeding commenced ofter the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * (U. S. C., Title 28, Sec. 41.)

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *. (U. S. C., Title 28, Sec. 250.)

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING.

H. C. KILPATRICK,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

May It Please the Court:

Your petitioner, United States, ex relatione Girard Trust Company, as trustee under the will of John A. Brown, Jr., deceased, respectfully presents this, its motion for leave to file, out of time, the annexed petition for rehearing, on its petition for a writ of certiorari in this Honorable Court in the above entitled cause, and, in support thereof, presents the following:

The petition for certiorari herein was denied by this Honorable Court on December 7, 1936, so that the time for filing petition for rehearing, as prescribed by Rule 33 of this Honorable Court, expired on January 1, 1937.

Since that time, namely, on February 4, 1937, the United States Circuit Court of Appeals for the Third Circuit rendered its decision in the case of *United States of America v. Arthur S. Arnold, et al., Surviving Trustees of the Estate of Samuel F. Nirdlinger, Deceased*, No. 5777, October Term,

1935 (not yet officially reported; copy of the opinion is printed as Appendix A to the annexed petition for rehearing). The decision of said court is in conflict with the decision of the United States Court of Appeals for the District of Columbia in the instant case, as more clearly appears from the annexed petition.

There are pending in District Courts within the Third Circuit numerous suits for refund of income taxes[1] involving the same question decided in the *Arnold* case and in the instant case, and it is reasonable to assume that the government will seek review of that question by this Honorable Court, either in the *Arnold* case or in some other similar case from that Circuit, in order that the conflict in question may be settled. Should this Honorable Court then approve the view of the Circuit Court of Appeals for the Third Circuit, grave injustice will result to the relator herein if this motion be denied.

WHEREFORE, your petitioner respectfully moves the Court for leave to file the annexed petition for rehearing on its petition for certiorari to the United States Court of Appeals for the District of Columbia out of time.

GIRARD TRUST COMPANY, Trustee Under
The Will of John A. Brown, Jr.,
Deceased

By its Attorney:

H. C. KILPATRICK.

CERTIFICATE OF COUNSEL.

I, H. C. KILPATRICK, counsel for the above named petitioner, do hereby certify that the foregoing motion for leave to file petition for rehearing out of time is presented in good faith and not for delay.

H. C. KILPATRICK,
Counsel for Petitioner.

[1] See Appendix B to annexed petition for rehearing.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

Comes now the above-named petitioner, and by leave of court first had and obtained, presents this its petition for a rehearing of the petition for certiorari in the above entitled cause and, in support thereof, respectfully shows:

I.

Since the Denial of the Petition for Certiorari Herein, the United States Circuit Court of Appeals for the Third Circuit Has Rendered a Decision in Conflict With the Decision of the United States Court of Appeals for the District of Columbia in the Instant Case.

The petition for certiorari herein was denied on December 7, 1936.

On February 4, 1937, the United States Circuit Court of Appeals for the Third Circuit rendered its decision and promulgated its opinion in the case of *United States of America* v. *Arthur S. Arnold, et al., Surviving Trustees of the Estate of Samual F. Nirdlinger, Deceased*, No. 5777, October Term, 1935. That opinion has not yet been officially reported, but a copy thereof is attached to this petition as

Exhibit A. The decision in that case is clearly in conflict with the decision below in the instant case.

In the instant case the Commissioner of Internal Revenue refused to refund to a testamentary trustee income taxes illegally collected from it. His refusal was based upon the fact that an individual beneficiary of the trust had obtained erroneous refunds of income taxes for some years and had failed to pay income taxes due for other years, which refunds and unpaid taxes in the aggregate exceeded the amount due the trustee, but which were barred from recovery by the government under the applicable statutes of limitation. The trustee, relator herein, sought by mandamus[1] to compel refund to it of the amounts admittedly overpaid by it. The Commissioner defended on the ground that, by reason of the facts aforesaid, he should not "in equity and good conscience • • • be commanded and directed to refund" the amounts otherwise due the trustee (R. 25). The Court of Appeals for the District sustained this defense, holding that, although petitioner undoubtedly had a legal right to the refund demanded, it would be inequitable to enforce that right. *85 F. (2d) 230, 234.* In so deciding, the court followed and cited with approval the decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Stone,* 78 F. (2d) 136[2] saying that, "except for procedural differences" the cases were identical, and that "we can think of no reason why the same rule should not apply here."

In the *Arnold* case, *supra,* testamentary trustees erroneously reported certain income as taxable to the trust, whereas such income was properly taxable to the beneficiaries of the trust. In a suit by the trustees for refund of the taxes erroneously paid by them, the United States con-

---

[1] The Court of Appeals held mandamus to be the appropriate remedy since the fact and amount of the overpayment had been determined by final decision of the Board of Tax Appeals.

[2] We understand that a petition for rehearing is also being filed with this court in *Stone* v. *White, supra,* (No. 202, October Term, 1935, in this Court), based upon the conflict arising from the decision in the *Arnold* case.

tended that "it would be inequitable to allow recovery" because the bar of the statute of limitations prevented collection of taxes from the beneficiaries who should have paid it in the first instance. This defense was expressly rejected by the Court (see Appendix A).

In neither the *Arnold* case nor the instant case was the Commissioner's failure to proceed against the beneficiary attributable to any act or omission of either the trustee or the beneficiary. In each case the commissioner of Internal Revenue was put on notice by the trustee of its denial of tax liability long before the government was barred from proceeding against the beneficiary. Cf. *Hulburd v. Commissioner*, 296 U. S. 300, 303-4.

The direct conflict between the two decisions is apparent, and it is therefore respectfully submitted that this Court should vacate the order denying the petition for certiorari herein, and grant said petition, in order that the conflict in question may be settled.

II.

It is Important that this Conflict Be Settled Promptly, Because of the Large Number of Cases Now Pending in Which the Same Question is Involved.

While petitioner is not informed as to whether the government will petition for certiorari in the *Arnold* case, it is reasonable to believe that that decision will be followed in numerous other cases now pending in the District Courts within the Third Circuit.[3] It seems inevitable, therefore, that the question eventually will reach this Court. Should the view of the Circuit Court of Appeals for the Third Circuit then be adopted by this Court, injustice would result to the relator if it alone were not given the benefit of such decision.

Since the *Arnold* decision was announced, there was de-

[3] For a partial list of such cases—as well as similar cases pending in other Federal Courts throughout the country—see Appendix B attached hereto.

cided on February 9, 1937, by the United States District Court for the Western District of Pennsylvania the case of *Union Trust Company, Trustee,* v. *United States,* Law No. 7862, wherein the plaintiff, a trustee, had been required to pay a tax upon income which properly should have been taxed to a beneficiary of the trust, and in a timely suit for refund, the government defended on the ground that it was then too late to assess and collect the tax from the beneficiary and that, therefore, it would be inequitable to allow the refund to the trustee. This defense was held invalid, the court saying:

> "The court feels that it is controlled in its decision by the case of UNITED STATES v. ARNOLD, No. 5777 October Term, 1935, 3rd C. C. A., filed February 4, 1937. The Circuit Court of Appeals for this Circuit, in that case held that the Trustees should recover the taxes paid by them, and overruled the government's recoupment defense. The facts in UNITED STATES v. ARNOLD are essentially parallel to those of the instant case. In each case the demand for refund had been made by the Trustee prior to the expiration of the limitation period for assessment against the beneficiary.
>
> "In the light of the judgment of the Circuit Court of Appeals, supra, this court revises its conclusions previously reached, and will order judgment in favor of the plaintiff."

As will be seen from the list of cases appearing in Appendix B, there are at least forty-two similar cases pending in the two Pennsylvania District Courts, in which it is reasonable to suppose that the *Arnold* decision will be followed, and not the decision below in the instant case, or the decision in *White* v. *Stone, supra.* It is respectfully submitted, therefore, that a prompt settlement of the conflict is desirable to avoid confusion as to the applicable rule of law in a large group of cases now actually pending.

WHEREFORE, your petitioner prays that this Court vacate its order of December 7, 1936, denying the petition for

certiorari herein, and rehear petitioner's petition for certiorari; and that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6618, October Term, 1935, *United States, Ex Relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., Deceased, Appellant*, v. *Guy T. Helvering, Commissioner of Internal Revenue, Appellee*, and that the said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GIRARD TRUST COMPANY, Trustee
Under the Will of John A.
Brown, Jr., Deceased,

By H. C. KILPATRICK,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, H. C. Kilpatrick, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

H. C. KILPATRICK,
Counsel for Petitioner.

APPENDIX A.

In the United States Circuit Court of Appeals
For the Third Circuit.

No. 5777. October Term, 1935.

UNITED STATES OF AMERICA, *Defendant-Appellant*,

v.

ARTHUR S. ARNOLD and THE REAL ESTATE LAND TITLE AND TRUST COMPANY, Surviving Trustees of the Estate of Samuel F. Nirdlinger, Deceased, *Plaintiffs-Appellees*.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

OPINION.

(Filed February 4, 1937)

Before Davis and Thompson, Circuit Judges, and Forman, District Judge.

Davis, Circuit Judge.

This is an appeal from a judgment of the District Court allowing recovery of an overpayment of income tax by the trustees.

In 1928 the trustees sold some of the assets of the Nirdlinger Estate and reported a profit of $169,656.51 on which they paid the income tax for that year. When their account was filed with the Orphans Court of Philadelphia County in 1932, it decreed that $23,805.23 of the profit resulting

from the sale did not belong to the estate, but to the life tenants or beneficiaries and was "currently" distributable to them.

Accordingly the tax thereon should have been paid by the beneficiaries and not by the trustees for the estate. Seasonable demand for the return of the overpayment was made and refused and suit was brought to recover it.

Income "currently" distributable to a beneficiary is, within the meaning of taxing statutes, income of the beneficiary as of the time of its receipt by the fiduciary and is returnable by and taxable to the beneficiary, whether or not distributed to him. *McCaughn* v. *Girard Trust Co.*, 19 Fed. (2d) 218; *Freuler* v. *Helvering*, 291 U. S. 35. Consequently the income of $23,805.23 distributable in 1928 to the beneficiaries but retained for some time by the trustees was income of, and taxable to, the beneficiaries.

But the government says that it would be inequitable to allow the trustees to recover for the reason that the statute of limitations has run and it cannot recover from the beneficiaries. Therefore, it says, the trustees are estopped. But the trustees made demand for the return of the overpayment and this was refused by the Commissioner before the statute had run. Estoppel, however, as Judge Dickinson, in the following quotation well said, in disposing of this case, is not a defense to this action:

> "The final refuge of the defense is in the estoppel set up. Estoppel is an equitable doctrine. Here the right of action is a legal right and indeed a statutory one. It may be that the right should not have been given under conditions, such as here, where the giving of it enables the beneficiary to escape payment of a tax which he otherwise should pay but this does not affect the question of whether it was given. It is agreed all around that a tax might have been assessed against the beneficiaries. The neglect or refusal to so assess it would not make the Estate or any one else taxable who otherwise would not be. We do not see that a mistake of judgment or any cause or reason for the failure to tax

one affects the legal rights of others. The distinction between Law and Equity is illustrated by that between Laches and a Statute of Limitations. They are founded on the like considerations. Equity however, denies a remedy when under all the circumstances the complainant has forfeited his right to it. The law applies only the calendar test. Is the plaintiff within the time allowed him? A Statute of Limitations may be tolled when in good faith it should not be invoked but no equitable considerations will deny to a plaintiff his legal rights by shortening the period of limitation allowed by law. Had the plaintiffs failed to bring the present action within the statutory time limit no excuse for the delay based upon hard luck considerations would avail them because the right they are seeking to assert is a legal right. By the same token a legal right bestowed is not lost by like considerations. We refrain from discussing the doctrine of estoppel because it has no place in the discussion of a legal right."

The judgment is affirmed.

APPENDIX B.

The following cases, all of which involve the same general question as that decided in *White* v. *Stone*, 78 F. (2d) 136, and in *United States* v. *Arnold, et al.*, (Appendix A, *supra*), are now pending in the courts indicated. Doubtless, there are many others of which petitioner has no knowledge:

1. In the United States District Court of the Eastern District of Pennsylvania.

Plaintiff's Name	Number	Amount
Cadwalader, Jr., et al.	17346	$3,000.00
The Pennsylvania Co. for Insurance, etc., et al.	18208	7,000.00
The Pennsylvania Co. for Insurance, etc., et al.	18222	700.00

Plaintiff's Name	Number	Amount
Provident Trust Co., et al.	18078	28,000.00
Provident Trust Co., et al.	18396	4,352.38
Provident Trust Co., et al.	18404	1,348.24
Packard, et al., Exrs. and Trs.	17590	15,000.00
Smith, et al., Exrs. and Trs.	17030	11,000.00
Lear, et al., Exrs. and Trs.	18206	2,000.00
Gillett, et al., Trs.	18630	2,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18096	5,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18098	800.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18322	200.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18410	400.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18186	3,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18100	4,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18408	3,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18324	300.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18102	29,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18326	1,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18104	200.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18106	300.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18108	1,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	19170	2,510.49
Fidelity-Philadelphia Trust Co., et al., Trs.	19198	8,049.37
Fidelity-Philadelphia Trust Co., et al., Trs.	19196	2,144.44
Fidelity-Philadelphia Trust Co., et al., Trs.	19356	5,317.00

Plaintiff's Name	Number	Amount
Fidelity-Philadelphia Trust Co., et al., Trs.	19310	391.25
Girard Trust Co., et al., Trs.	18138	600.00
Girard Trust Co., et al., Trs.	19480	1,542.27
Girard Trust Co., et al., Trs.	19484	540.38
Girard Trust Co., et al., Trs.	19482	827.42
Girard Trust Co., et al., Trs.	19492	9,785.06
Girard Trust Co., et al., Trs.	19486	240.50
Trustees Estate of Sydney Wright	18232	1,000.00
Executors Estate of John P. Crozer	18654	17,000.00
Trustees Estate of John P. Crozer	18656	4,000.00
Pennsylvania Company, et al., Trs.	18260	500.00
Pennsylvania Company, et al., Trs.	18334	500.00
Pennsylvania Company, et al., Trs.	18430	300.00
2. In the United States District Court for the Western District of Pennsylvania.		
*The Union Trust Company of Pittsburgh, Trustee	7862	$84,000.00
Fidelity Trust Company, et al., Trustees	7959	2,000.00
3. In the United States District Court for the Northern District of Illinois, Eastern Division.		
First National Bank of Chicago, Trustee	43595	
First National Bank of Chicago, Trustee	43954	
The Northern Trust Company, Trustee	44015	
Chicago Title & Trust Company, Trustee	43610	2,000.00
4. In the United States Circuit Court of Appeals for the First Circuit.		
Stone v. White	**	43,000.00
Stone v. White	**	30,000.00
5. In the United States Circuit Court of Appeals for the Fifth Circuit.		
***First National Bank of Birmingham, et al., Trustees	4466	

* Decided February 9, 1937. See petition for rehearing, *supra*, p. 6.

** Decided U. S. District Court March 1, 1935, in favor of plaintiffs; appealed to Circuit Court of Appeals, First Circuit, by defendant (collector); on stipulation, printing of record postponed until final disposition of *Stone* v. *White*, No. 202, October Term 1935, of this Court.

*** On appeal from decision reported in 12 Fed. Supp. 301.

SUPREME COURT OF THE UNITED STATES.

No. 285.—October Term, 1936.

United States ex relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., Deceased, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[May 24, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

In this case we are asked to determine whether mandamus is the proper remedy to compel the Commissioner of Internal Revenue to refund taxes, paid by a testamentary trustee on income of the trust, when the amount refunded would inure to the benefit of the *cestui que trust*, who should have paid the tax, now barred by the statute of limitations.

The testator by his will created a trust to pay over net income to his widow during her life. She elected to take under the will in lieu of the interest otherwise allowed by Pennsylvania law. The refund demanded is for taxes assessed against petitioner, the trustee, and paid by it upon the net income paid over to the beneficiary for the years 1924 to 1926, inclusive, and for the year 1928.

As a result of deficiency proceedings the Board of Tax Appeals has entered final orders determining that the amounts paid by the trustee as taxes for those years are overpayments. The beneficiary paid taxes on the income paid over to her by the trustee for the years 1924 to 1927 inclusive, but these were afterward refunded to her in recognition of the rule then followed by several courts of appeals that in these circumstances the income payments to the widow are annuities purchased by her surrender of her dower interest which are not taxable as income to her, until they equal the value of the dower interest. *Warner* v. *Walsh*, 15 F. (2d) 367; *United States* v. *Bolster*, 26 F. (2d) 760; *Allen* v. *Brandeis*, 29

F. (2d) 363. See No. 202, Oct. Term, 1935, *Stone* v. *White*, decided this day. She paid no tax on the income for the year 1928.

By our decision in *Helvering* v. *Butterworth*, 290 U. S. 365, it was established that the income paid over to the widow is taxable to her and not to the trustee, and in consequence that the tax, which in this case should have been paid by the beneficiary, had been erroneously collected from the trustee. It appears that the total amount of the taxes which the beneficiary should have paid exceeds the amount of the refund demanded of the Commissioner, and that the refund, if allowed, will become a part of the income of the beneficiary.

The present petition for mandamus to compel respondent, the Commissioner of Internal Revenue, to refund to petitioner the taxes erroneously collected, was dismissed by the Supreme Court of the District. The Court of Appeals affirmed, holding that the petitioner was not equitably entitled to the refund which, if allowed, would inure to the benefit of the widow, whose liability for the tax is barred by the statute of limitations. 85 F. (2d) 230. We granted certiorari, — U. S. —, the questions decided by the Court of Appeals being cognate to those considered in *Stone* v. *White, supra.*

The government, while supporting the decision of the court below on the merits, insists that the case is not a proper one for the use of the extraordinary writ of mandamus, and that the suit should have been dismissed on that ground. The petition for mandamus is predicated upon the determination of the Board of Tax Appeals that petitioner has made overpayments of taxes for the specified years. The Board has not ordered a refund. It could not rightly do so, for its jurisdiction is limited to the determination of the amount of deficiency or overpayment, Revenue Act of 1928, §§ 272, 322 (d), 507, upon the petition of the taxpayer to review a deficiency assessment by the Commissioner. The Board is without authority to order a refund or a credit, although its decision is *res adjudicata* as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed. Cf. *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716, 726-727. When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or

credited, § 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co.* v. *United States*, 52 F. (2d) 1011, 1013-1014; *James* v. *United States*, 38 F. (2d) 140, 143; *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 148-149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone* v. *White, supra;* No. 602, *Welch* v. *Obispo Oil Co.*, decided April 26, 1937; *Lewis* v. *Reynolds*, 284 U. S. 281; *Crocker* v. *Malley*, 249 U. S. 225.

In view of what we have just decided in *Stone* v. *White, supra*, it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund. Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory, mandamus is not an appropriate remedy. *United States* v. *Interstate Commerce Commission*, 294 U. S. 50, 61; *United States* v. *Wilbur*, 283 U. S. 414, 419-420; *Wilbur* v. *United States*, 281 U. S. 206, 218-219; *Interstate Commerce Commission* v. *New York, N. H. & Hartford R. Co.*, 287 U. S. 178, 203; *United States* v. *Windom*, 137 U. S. 636, 644. The officer must be left free, in the performance of official duty, to decide whether he will perform the act demanded or secure by appropriate procedure a judicial determination of the extent of his duty. His decision "is regarded as involving the character of judgment or discretion", the exercise of which will not be compelled by mandamus. *Wilbur* v. *United States, supra*, 219. *Hall* v. *Payne*, 254 U. S. 343, 347; *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, 325; *Interstate Commerce Commission* v. *New York, N. H. & Hartford R. Co., supra.*

It is true that the right to a writ of mandamus may turn on equitable considerations, as the court below held. *United States* v. *Dern*, 289 U. S. 352. But to try petitioner's equitable right to the refund here is to make the writ of mandamus serve the purpose

of an ordinary suit and to depart from the settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete. See *Ex parte Baldwin*, 291 U. S. 610, 619; *Reeside* v. *Walker*, 11 How. 272, 292; *United States* v. *Duell*, 172 U. S. 576, 582.

As we conclude that the issue is not one which should be adjudicated in a proceeding for mandamus it is unnecessary to consider the merits and the judgment will be affirmed without prejudice to any other appropriate proceeding for the refund of the tax.

Affirmed.

Mr. Justice ROBERTS is of the opinion that the judgment should be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.